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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

HECTOR RIVERA CRUZ, SECRETARY OF JUSTICE OF THE COMMONWEALTH OF PUERTO RICO,
Petitioners,

v.

PLAYBOY ENTERPRISES, INC., *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FIRST CIRCUIT

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Commonwealth of Puerto Rico

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September 19, 1990

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QUESTIONS PRESENTED

Whether §558 of the Cable Communications Policy Act creates an enforceable right, privilege or immunity under §1983 which may be offensively raised to preempt the Commonwealth's enforcement of its obscenity laws against cable operators arguably transmitting obscene programming.

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of The Commonwealth of Puerto Rico,
Petitioner,

v.

PLAYBOY ENTERPRISES, INC., *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FIRST CIRCUIT

Petitioner Héctor Rivera Cruz, Secretary of the Department of Justice of the Commonwealth of Puerto Rico, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the First Circuit entered in the above-entitled proceeding on June 21, 1990.

OPINIONS BELOW

The opinion of the Court of Appeals for the First Circuit is reported at 906 F.2d 25 (1st Cir. 1990) and is reprinted as Appendix A, included hereto.

The opinion for the United States District Court for the District of Puerto Rico is reported at 698 F.

Supp. 401 (D.P.R. 1988) and is reprinted as Appendix B, included hereto.

JURISDICTION

The judgment of the Court of Appeals was entered on June 21, 1990. The jurisdiction of this Court to review the judgment of the First Circuit is invoked under 28 U.S.C. sec. 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Article VI, cl.2

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

47 U.S.C. §556 Coordination of Federal, State, and local authority;

(c) Preemption

> Except as provided in section 557 of this title, any provision of law of any State, political subdivision, or agency thereof, or franchising authority, or any provision of any franchise granted by such authority, which is inconsistent with this chapter shall be deemed to be preempted and superseded.

47 U.S.C. §558 Criminal and Civil Liability

> Nothing in this subchapter shall be deemed to affect the criminal or civil liability of cable programmers or cable operators pursuant to the Federal, State, or local law of libel, slander, obscenity, incitement, invasions of privacy, false or misleading advertising, or other similar laws, except that cable operators shall not incur any such liability for any program carried on any channel designated for public, educational, governmental use or on any other channel obtained under section 532 of this title or under similar arrangements.

42 U.S.C. §1983

> Every person who, under color of any statute, ordinance, regulation, customs, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

This petition arises out of a civil action pursuant to Section 1983 challenging the authority of the Secretary of Justice to enforce the Commonwealth's laws criminalizing the transmission or retransmission of obscene programming over cable television, P.R. Laws Ann. tit. 33. secs. 4074-4081 (Supp. 1988), particularly

as amended by sec. 4094(a); and challenging the authority of the Commonwealth's cable television franchising authority, the Public Service Commission (PSC), to enforce "Agreement Number 2," a regulation adopting the statutory definition of obscene programming and providing sanctions for violations by cable operators.

The original complaint contained three causes of action, of which only one survived on appeal to the First Circuit.[1] The first cause of action asserted that the Puerto Rico obscenity statutes and Agreement No. 2 issued by the PSC violated the First Amendment. This cause of action became moot when plaintiffs dropped their constitutional challenge to the obscenity laws and the PSC defendants stipulated that they would not initiate administrative proceedings against the cable operators until regulations were enacted pursuant to Agreement No. 2.[2]

The second cause of action claimed that by threatening criminal proceedings against cable operators for transmission of video programming on The Playboy Channel prohibited by the Puerto Rico obscenity stat-

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[1] The plaintiffs-respondents are Playboy Enterprises, Inc. (PEI), the Playboy Programming Distribution Company of America (PPDC), and the Puerto Rico Cable Television Association (PRCTA). The original defendants included not only the Secretary of Justice, Hector Rivera Cruz, but also the Public Service Commission (PSC), the PSC Commissioners, and assistant district attorney Angel E. Rosa. With the dismissal of the action against Rosa and the PSC, and a stipulation entered by the PSC members, the appeal of all but the petitioner became moot.

[2] In any event, the district court held that both the Puerto Rico obscenity laws and Agreement Number 2 were constitutional.

utes, defendants violated plaintiffs First Amendment rights, pursuant to *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963). This cause of action also became moot upon the entry of a permanent injunction by consent upon this matter.[3]

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[3] The Court's Permanent and Preliminary Injunction Order of June 4, 1987, based on stipulations submitted by the parties, balances the Secretary's concern with the state's enforcement of its obscenity laws, with plaintiffs concern with their First Amendment and federal rights. In it, "the parties recognize the authority of the Commonwealth of Puerto Rico to regulate obscenity transmitted on cable television in Puerto Rico to the extent and in the manner permitted by the Constitution of the United States, applicable laws and the terms of the attached Order." Thus, defendants consented to the entry of permanent and preliminary injunction with respect to conduct allegedly unconstitutional, provided that said consent did not "constitute an admission by defendants that the conduct alleged in the complaint in fact occurred." As a result, plaintiffs desisted from their *Bantam Books* claim. At all times, however, the Secretary has contended that its investigation of cable operators is legitimate law enforcement of potentially obscene transmissions pursuant to a concededly constitutional state obscenity statute. This is a far cry from *Community Television of Utah, Inc. v. Wilkinson*, 611 F. Supp. 1099, 1103-05 (D.C. Utah 1985), *aff'd sub nom Jones v. Wilkinson*, 800 F.2d 989 (10th Cir. 1986), *summarily aff'd sub nom Wilkinson v. Jones*, ___ U.S. ___, 107 S. Ct. 1559 (1987) (preemption of Utah statute that was vague and standardless on its face and which restricted constitutionally protected speech). In *Bantam Books*, this Court noted that:

> In holding that the activities disclosed on this record are constitutionally proscribed, we do not mean to suggest that private consultation between law enforcement officers and distributors prior to the institution of a judicial proceeding can never be constitutionally permissible. We do not hold that law enforcement officers must renounce all informal contacts with persons suspected of violating valid laws prohibiting

The third cause of action asserts that Section 558 of the Cable Communications Policy Act preempts criminal prosecution by the Department of Justice or administrative proceedings by the Public Service Commission against cable operators for transmission of video programming on the Playboy Channel arguably prohibited by the Puerto Rico obscenity statutes because the Playboy plaintiffs obtained and maintained The Playboy Channel through leased access pursuant to § 532 of the Cable Act, 47 U.S.C. § 532.

On May 13, plaintiffs filed a motion for temporary restraining order, and on May 14, 1987, the district court issued a TRO on plaintiffs' behalf. On June 1, 1987, the parties submitted to the court Stipulations and Proposed Order, which were adopted by the court by an order of June 4, 1987, titled Permanent Injunction, Preliminary Injunction and Further Scheduling Order. The district court then bifurcated the liability issue from the damages issue and ordered the parties to submit cross-motions for summary judgment.

Through an opinion and order of October 31, 1988, the district court held, *inter alia*, that Section 558 of the Cable Act preempted enforcement of the obscenity statutes by state authorities against any cable operator carrying programming pursuant to Section

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> obscenity. Where such consultation is genuinely undertaken with the purpose of aiding the distributor to comply with such laws and avoid prosecution under them, it need not retard the full enjoyment of First Amendment freedoms.

Id., 372 U.S. at 71-72.

532 of the Act. On appeal, the petitioner contended before the First Circuit that the Cable Act, particularly Section 558, did not create a right, privilege or immunity enforceable pursuant to Section 1983. Through Judgment of June 21, 1990, the First Circuit found to the contrary. This petition for a writ of certiorari is to review said judgment.

REASONS FOR GRANTING THE WRIT

The First Circuit's decision that Congress did not intend to foreclose a suit under Section 1983 to enforce Section 558 of the Cable Act raises a substantial and important question of constitutional and statutory construction

The question presented by this petition is whether the immunity from criminal or civil liability of cable operators under federal, state or local laws of obscenity provided by Section 558 of the Cable Act is a sword that may be offensively utilized pursuant to Section 1983 to preempt the Commonwealth's enforcement of its obscenity statutes, or merely a defensive shield to be raised in a state obscenity prosecution. In its decision, the First Circuit held that this immunity could be "protected effectively by enjoining prosecution" pursuant to a Section 1983 suit. *Playboy Enterprises*, 906 F.2d at 32. The Commonwealth seeks reversal of said decision because it dislocates the coordinate exercise of federal, state and local authority established by Congress in the Cable Act, particularly with respect to an area traditionally subject to a state's police powers, such as obscenity.

In *Golden State Transit Corp. v. City of Los Angeles*, ___ U.S. ___, 110 S.Ct. 444 (1989), this Court articulated a two-step inquiry for determining when

a federal statute creates "any rights, privileges, or immunities," the deprivation of which is enforceable under Section 1983. First, the plaintiff must assert the violation of a federal right " 'sufficiently specific and definite' to be within 'the competence of the judiciary to enforce.' " *Golden State*, 110 S.Ct. at 449, quoting *Wright v. Roanoke Redev. & Housing Authority*, 479 U.S. 418, 432 (1987). Under the first inquiry, the Court considered whether the provision in question: (a) "creates obligations binding on the governmental unit or rather 'does no more than express a congressional preference for certain kinds of treatment,' " *Golden State*, 110 S.Ct. at 448, quoting *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 19 (1981); and (b) whether it "was 'inten[ded] to benefit' the putative plaintiff." *Golden State*, 110 S.Ct. 448, quoting *Wright*, 479 U.S. at 430.

The second inquiry focuses on whether, even where the plaintiff has asserted a federal right, the defendant may show that "Congress 'specifically foreclosed a remedy under § 1983,' by providing a 'comprehensive enforcement mechanis[m] for protection of a federal right.' " *Golden State*, 110 S.Ct. at 448, quoting *Smith v. Robinson*, 468 U.S. 992, 1003, 1005 n.9 (1984). Under this inquiry, the availability of administrative mechanisms for the protection of plaintiff's interest is not dispositive of congressional intent to foreclose a § 1983 remedy; rather, "the statutory framework must be such that '[a]llowing a plaintiff' to bring a § 1983 action 'would be inconsistent with Congress' carefully tailored scheme.' " *Golden Sate* 110 S.Ct. at 449, quoting *Smith*, 468 U.S. at 1012.

While the First Circuit recognizes that the Cable Act "does contain certain private remedies," it concludes that "the sum of these remedial provisions hardly creates a 'comprehensive remedial scheme' leaving 'no room for additional private remedies under Section 1983.' " *Playboy Enterprises*, 906 F.2d at 32-33 (citations omitted). According to the First Circuit, the remedial scheme of the Cable Act is limited to instances of "private conduct regulated by the Act, or at the cable franchising authority;" its provisions do not afford "a remedy against state actors (other than the franchise authority) who might encroach on rights [such as Section 558] guaranteed by the Cable Act." *Id.* at 33.

The First Circuit's decision misconstrues the Congressional intent to foreclose a Section 1983 action in two fundamental interrelated aspects. First, it undervalues the elaborate multitiered enforcement and remedial scheme provided by the Act.[4] Under said

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[4] The enforcement and remedial provisions of the Cable Act are as follows:

(1) Section 531(c) grants a franchising authority power to enforce any requirement in any franchise regarding the provision or use of channel capacity for public, educational or governmental use. This section is enforceable through state court proceedings. *See* P.R. Laws Ann. tit. 27, sec. 1108 (Supp. 1988) (authority of PSC to institute judicial proceedings via Secretary of Justice); *City of Burlington v. Mountain Cable Co.*, 559 A.2d 153 (Vt. 1988).

(2) Section 532(d) and (e) provides that any person aggrieved by the failure or refusal of a cable operator to make channel capacity available for use pursuant to section 532 may: (a) bring a private action in the District Court of the United States for the judicial district in which the cable system is

scheme, virtually every substantive grant of rights under the Cable Act is accompanied by a correspond-

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located to compel that such capacity be made available, 47 U.S.C. §532(d); (b) petition the Commission (FCC) for relief under said subsection upon a showing of prior adjudicated violations of the section, 47 U.S.C. § 532(e).

(3) Section 532(g) authorizes the FCC to enact further regulations concerning diversity of information sources, which in turn are subject to review pursuant the provisions of the Administrative Procedure Act.

(4) Section 533(c) also permits the FCC to enact regulations with respect to ownership or control of cable system, also subject to review pursuant to the APA.

(5) Sections 541(d) and (e) preserves the authority of the states to regulate any cable operator to the extent that such cable operator provides any communication service other than cable service and to regulate facilities serving subscribers in multiple dwelling units.

(6) Section 542(d) allows the operators access to court to review the appropriateness of franchise fees.

(7) Section 555 establishes judicial proceedings for any cable operator adversely affected by a final determination made by a franchise authority under sections 545 (modification of franchise obligations) and 546 (renewal) of the Cable Act.

(8) Section 551(f) (protection of subscriber privacy) allows for a civil action in the federal district court to any person aggrieved by any act of a cable operator in violation of section 551.

(9) Section 552 (consumer protection) provides any franchise, authority may enforce any provision of Section 552(a).

(10) Section 553(c) (unauthorized reception of cable service) provides for civil action in the district court of the United States to any person aggrieved by any violation of Section

ing enforcement or remedial mechanism divided horizontally among federal, state and franchising authorities and vertically among cable operators, competitors, subscribers, and employees. In this manner, one of the fundamental purposes of the Cable Act is achieved, that is, "to establish guidelines for the exercise of Federal, State, and local authority with respect to the regulation of cable systems." 47 U.S.C. sec. 521(3). *See ACLU v. FCC*, 823 F.2d 1554, 1559 (D.C. Cir. 1987).

The second deficiency in the First Circuit's analysis is its omission of any reference to the pervasive design evidenced in the Act to preserve to the states the traditional police power in the enforcement of laws concerning any matter that is obscene or otherwise unprotected by the Constitution. Under the comprehensive regulatory scheme established by Congress in the Cable Act to regulate the cable industry,

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553(a)(1).

(11) Section 554 (equal employment opportunity) allows the FCC to regulate, investigate and enforce equal employment requirements, permit employees or applicants for employment to file discrimination complaints with the FCC, allows the State or franchising authority to establish and enforce equal employment requirements, and provides that the "remedies and enforcement provisions of this section are in addition to, and not in lieu of, those available under this or any other law". 47 U.S.C. § 554(f), (g) and (i)(3).

(12) Section 556 provides that nothing in the Cable Act shall be construed to affect the authority of any State, political subdivision, or agency thereof regarding matters of public health, safety and welfare to the extent consistent with the express provisions of the Act.

(13) Section 558 (criminal and civil liability), *supra*.

clear authority was allocated to state and local governments to regulate obscene program content in cable television. Such authority is consistent with one of the Act's stated aims of establishing "franchising procedures and standards which encourage the growth and development of cable systems and which assure that cable systems are responsive to the needs and interests of the local community." 47 U.S.C. § 521(2). The coordinate system of enforcement and remedies continues reliance on the local franchising process as the primary means of cable television regulation, while defining and limiting the authority that a franchising authority may exercise through the franchise process." H.R. Rep. No. 934, 98th Cong., 2d Sess. 19 (1984), *reprinted in* 1984 U.S. Code Cong. & Ad. News 4665, 4666 (hereinafter "House Report"). Pursuant to such policy, the Cable Act "preserve[s] the critical role of municipal governments in the franchise process, while providing appropriate deregulation in certain respects to the provision of cable service." *Id.* Congress believed that, as long as local regulation was consistent with the federal standards established in the Cable Act, local authorities "have the best understanding of local communication needs and can require cable operators to tailor the cable system to meet those needs." House Report at 24, 1984 U.S. Code Cong. & Ad. News 4661. *See also*, 47 U.S.C. § 556.

With respect to obscenity, several provisions of the Act relate to this concern: 47 U.S.C. §§ 532(h), 544(d), 544(f), 556, 558 and 559. Section 544(d)(1) of the Cable Act states:

> Nothing in this title shall be construed as prohibiting a franchising authority and a ca-

> ble operator from specifying, in a franchise or renewal thereof, that certain cable services shall not be provided or shall be provided subject to conditions, if such cable services are obscene or are otherwise unprotected by the Constitution of the United States.

Congress included the above quoted section in the Cable Act because it was "extremely concerned with the dissemination of programming containing explicit sexual material which might be offensive to many cable subscribers." House Report at 69, 1984 U.S. Code Cong. & Ad. News 4706. Mindful of the constraints of the First Amendment, Congress adopted the Supreme Court obscenity formulation as set down in *Miller v. California*, 413 U.S. 15 (1973). *Id.* Accordingly, under the Cable Act, "[f]ranchises may strictly prohibit cable services which would be violative of this standard." *Id. Accord, Community Television of Utah, Inc. v. Wilkinson*, 611 F. Supp. 1099, 1103-05 (D.C. Utah 1985), *aff'd sub nom Jones v. Wilkinson*, 800 F.2d 989 (10th Cir. 1986), *summarily aff'd sub nom Wilkinson v. Jones*, ___ U.S. ___, 107 S. Ct. 1559 (1987). Thus, as long as the state regulation only prohibits obscene matter or matter that is otherwise unprotected by the Constitution, the state may impose requirements regarding the provision or content of such unprotected cable service. 47 U.S.C. § 544(f)(1). Respondent concedes that Puerto Rico's obscenity laws satisfy the *Miller* standard. Thus, the Puerto Rican legislation is clearly consistent with the strictures of the Cable Act, since it does not exceed the scope of the Constitution.

Not only does the Cable Act allow the prohibition of obscene programming or cable service through the franchising process, but it also allows state and local authorities to impose criminal and civil liability upon both cable operators and cable programmers that transmit obscenity. Section 558 of the Cable Act provides:

> Nothing in this title shall be deemed to affect the criminal or civil liability of cable programmers or cable operators pursuant to Federal, State, or local law of libel, slander, *obscenity*, incitement, invasions of privacy, false or misleading advertising, or other similar laws, except that *cable operators* shall not incur any such liability for any program carried on any channel designated for public, educational, governmental use or any channel obtained under section 532 of this title or under similar arrangements. (emphasis added)

The quoted section is consistent with the previously analyzed sections of the Cable Act, in that it allows criminal and civil liability for speech that would be unprotected under the Constitution, as well as any other speech "which might be held by the courts to be unentitled to constitutional protection [as discussed in relation to § 544(d)". House Report at 95, 1984 U.S. Code Cong. & Ad. News 4732. Furthermore, the quoted provisions make clear that "cable programmers," such as PPDC in this case, are never immune from criminal or civil liability for transmitting obscenity. According to the legislative history, "[c]able programmers shall include all parties that exercise control over the content of programs, and would not only include program producers to the extent this

would be consistent with applicable Federal, state and local law." *Id.*

It is only when the Cable Act prohibits a person from exercising editorial control over the contents of a program, that § 558 provides for a shield from prosecution. Congress stated: "The section further provides that cable operators cannot be held criminally or civilly liable for material transmitted over public, educational, or governmental access channels, or leased access channels, since the bill otherwise prohibits the operator's editorial control over all such channel." House Report at 95, 1984 U.S. Code Cong. & Ad. News 4732.

But even in a case coming under this exception, the state is not left unarmed. Section 532(h) clearly provides:

> Any cable service[5] offered pursuant to this section shall not be provided, or shall be provided subject to conditions, if such cable service in the judgment of the franchising authority is obscene, or is in conflict with community standards in that it is lewd, lascivious, filthy, or indecent or is otherwise unprotected by the Constitution of the United States.

The legislative history states that this section "addresses an issue of particular concern to [Congress]—the potential availability of obscene or otherwise Constitutionally unprotected programming over cable sys-

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[5] "Cable service" means the "one-way transmission to subscribers of (i) video programming, or (ii) other programming service." 47 U.S.C. § 522(5) (1984).

tems." House Report at 55, 1984 U.S. Code Cong. & Ad. News 4692. Since leased access channels are not subject to the editorial control of the operator, Congress "believed it necessary to assure that the franchising authority have the ability to restrict the availability of obscene or otherwise unprotected programming over channels designated for use under this section. Thus, this subsection empowers franchising authorities to prohibit or condition the provision of cable services which are obscene," as determined by resort to local community standards. *Id.* Therefore, it is clear that even where the exception applies to free the cable operator from liability, the cable service, if found to be obscene, could still be prohibited by the franchising authority.

The foregoing review points to a conclusion at odds with the First Circuit's holding. The Cable Act provides for a multitiered, comprehensive and elaborate enforcement and remedial scheme, expressly identifying those sections where Congress desired to implant a right of action. The limited exception from criminal and liability granted to cable operators for programs carried pursuant to Section 532 is only a general proscription of conduct which the Supreme Court has found in similar circumstances not to grant an offensive private right of action. Thus, in *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U.S. 11, 19-20 (1979), the Supreme Court asserted that general proscriptions of conduct do not by themselves concede private cause of action. Where, as here, the statute contains a comprehensive enforcement and remedial scheme, punctuated with many specific statutory remedies, that scheme itself provides for the allowed federal actions and leaves no room for open-

ended claims to additional remedies under 42 U.S.C. § 1983. *Middlesex Cty. Severage Auth. v. National Sea Clammers*, 453 U.S. 1, 207 (1981); *Wright*, 107 S. Ct., at 771. The "existence of these express remedies demonstrates not only that Congress intended to foreclose implied actions but also that it intended to supplant any remedy that otherwise could be available under §1983." *Sea Clammers*, 453 U.S. at 221.

In its multitiered allocation of regulatory control, the Cable Act expressly reserved to the states their historical police power, particularly in the area of obscenity. Section 558 is one of many provisions of the Cable Act that safeguards the right of the state and the franchising authority to enforce obscenity laws. See 47 U.S.C. §§ 532(h), 544(d), 556, 558 and 559. It is clear that Congress did not intend to federalize state law enforcement of obscenity regulation. Typically, a cable programmer transmits from a satellite dish outside the jurisdiction where the cable operator disseminates the transmission. The conservation by state law enforcement agencies of their investigatory and enforcement powers allows the states to ascertain the authenticity of a claimed Section 532 relationship,[6]

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[6] In enacting Section 532, Congress was clearly desirous that channels designated by the cable operator for commercial use by unaffiliated persons not be used to frustrate the purposes underlying the section by *sham transactions*:

> The [House Committee on Energy and Commerce] recognizes the concerns that have been raised with respect to actions that might be taken by a cable operator that would frustrate the purpose underlying this section . . . There may be circumstances under which it would be permissible to enable a service presently being carried to gain access pursuant to this

to determine the identity and ownership of any programmer transmitting arguably obscene programming, and to effectively enforce constitutionally valid obscenity laws against programmers and cable operators not shielded by Section 558. Section 558 can be harmonized with the coordinate distribution of authority and the preservation of traditional police powers to the states established by the Cable Act only by interpreting it as a defensive shield in a state proceeding, and not as a sword in a Section 1983 action preempting state enforcement of its obscenity laws.

> section. For example, the cable operator might terminate his contract with the service *for reasons other than this section* . . . in order to avoid claims which, if not scrutinized, could lead to frustrating the intent of these provisions. The Committee expects the courts . . . in any case brought by an aggrieved party to examine the factual circumstances relating to the operators relationships with other programmers and *whether their services might have obtained access to the cable system without recourse to the provisions of this section.* The courts. . . . cannot allow the purposes of these provisions to be abused by the conduct of *sham transactions.* (emphasis supplied).

1984 U.S. CODE, CONG. & ADMIN. NEWS at 4691-4692.

> Subsection (d) [§532(d)] provides that if the court finds that channel capacity has not been set aside by the cable operator, or that channels designated by the cable operator for commercial use by unaffiliated persons are in fact being used by programmers *but their use otherwise frustrates the intent of this section*, then the court may order appropriate relief. (emphasis supplied).

Id., at 4689-4690.

CONCLUSION

This case presents an important constitutional and statutory issue of fundamental interest to the Commonwealth of Puerto Rico and other states concerned with the enforcement of obscenity laws with respect to programming that may be transmitted through cable television. The question presented requires the intervention of this Court to clarify the extent of the police powers of the states under Section 558 of the Cable Act to prosecute arguably obscene programming pursuant to valid obscenity laws. For the foregoing reasons, it is respectfully submitted that plenary consideration is essential.

In San Juan, Puerto Rico, for Washington, D.C., this 19th day of September, 1990.

Respectfully Submitted.

HECTOR RIVERA CRUZ
Secretary of Justice of the
Commonwealth of Puerto Rico

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 89-1026

PLAYBOY ENTERPRISES, INC., *ET AL.*,
Plaintiffs, Appellees,

v.

PUBLIC SERVICE COMMISSION OF PUERTO RICO, *ET AL.*,
Defendants, Appellants.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO
[Hon. Jaime Pieras, Jr., *U.S. District Judge*]

Before
Breyer, *Circuit Judge*,
Coffin and Fairchild,* *Senior Circuit Judges*.

Carlos Del Valle with whom *Hon. Hector Rivera Cruz*, Secretary of Justice, *Hon. Rafael Ortiz Carrion*, Solicitor General, and *Ramirez & Ramirez* were on brief for appellants.

David W. Ogden with whom *Donald B. Verrilli, Jr., Bruce J. Ennis, Jenner & Block, Maria Emilia Pico* and *Rexach & Pico* were on brief for appellees.

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* Of the Seventh Circuit, sitting by designation.

JUNE 21, 1990

FAIRCHILD, *Senior Circuit Judge*. This is an appeal from a declaratory judgment and injunction entered by the district court. We borrow considerably from Judge Pieras' thorough opinion, published at 698 F. Supp. 401 (D. Puerto Rico 1988).

I. Introduction

These facts are undisputed: Cable operating companies, after securing monopoly franchises from local authorities, provide the channels and hardware over which cable programming is transmitted. In order to encourage programming diversity, which might otherwise be stifled by the cable operator's monopoly, the Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2780, 47 U.S.C. § 521, *et seq.* (the Cable Act), requires cable operators which provide thirty-six or more activated channels to designate a percentage of those channels for commerical use by persons unaffiliated with the operator. 47 U.S.C. § 532.[1] When a cable programmer requests access to channel capacity, and capacity so designated is available, the cable operator must provide it, subject to the cable operator's right to set a reasonable price, and reasonable terms and conditions of use of the channel (sometimes called "leased access channel"). The operator may not exercise any editorial control over the programmer's choice of material. § 532(b)-(e). In exchange for the loss of editorial control, Congress relieved cable operators of potential criminal and civil liability for the content of transmissions carried over these channels, including liability for transmissions of obscenity. 47 U.S.C. § 558. *See*

[1] All references to provisions of the Cable Act are as codified in Title 47 of the United States Code.

H.R. Rep. 934, 98th Cong., 2d Sess. 95 (House Report No. 84-934), 1984 U.S. Code Cong. & Admin. News 4732.[2]

Puerto Rican law criminalizes the transmission or retransmission of obscene programming over cable television. P.R. Laws Ann. tit. 33, §§ 4074(a) & (c); 4079(a), as amended. The Commonwealth's cable television franchising authority, defendant Public Service Commission of Puerto Rico (the Commission), adopted in a document called "Agreement Number 2" the statutory definition of obscenity and the prohibition of obscene cable transmissions, and enumerated sanctions for violations by cable operating companies. The sanctions include fines and suspension or revocation of franchise licenses. 698 F. Supp. at 402-03.

In late March, 1987, defendant Angel E. Rosa, a prosecutor of Puerto Rico's Department of Justice, notified individual cable operating companies around the Commonwealth that he was preparing to file criminal obscenity charges against them for transmitting the Playboy Channel over their systems. By July, all cable operators except Teleponce, Inc., had stopped transmitting the Playboy Channel. 698 F. Supp. at 403; Supplemental Appendix (SA) at 91.

Playboy Enterprises, Inc. (PEI), through a wholly-owned subsidiary, distributed the Playboy Channel to cable operating companies. The Puerto Rico Cable Television As-

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[2] Section 558 provides

> Nothing in [the Cable Act] shall be deemed to affect the criminal or civil liability of cable programmers or cable operators pursuant to the Federal, State, or local law of libel, slander, obscenity, incitement, invasions of privacy, false or misleading advertising, or under similar laws, except that cable operators shall not incur any such liability for any program carried on any channel designated for public, educational, governmental use or on any other channel obtained under section 532 of this title or under similar arrangements.

sociation (the Cable Association) is an unincorporated trade association representing a group of Puerto Rican cable operating companies. Both sued the defendants under 42 U.S.C. § 1983, alleging that the Commonwealth's obscenity statute, the Commission's Agreement Number 2, and the Justice Department's threatened prosecutions all violated the First Amendment. They also alleged that any prosecution of the cable operators for obscenity was precluded by the Cable Act.[3]

The district court entered an agreed order on June 3, 1987. Under this order, the defendants were temporarily enjoined from prosecuting, during the pendency of this suit, any member of the Cable Association for any Playboy Channel transmissions. The defendants were also permanently enjoined from

(a) imposing any administrative sanctions against cable operator members of the Cable Association based upon any transmissions of the Playboy Channel, except that the Commission remained free to enact and enforce new regulations, consistent with the Constitution, concerning obscene cable transmission (leaving the Cable Association members a thirty-day window to challenge the regulations in court before they are enforced against them);

(b) threatening to prosecute members of the Cable Association for any programming carried on the Playboy Channel, or taking any adverse actions against the members in reprisal for the exercise of their First Amendment rights;

(c) prosecuting or sanctioning in any way members of the Cable Association or any other person or entity for past programming on the Playboy Channel;

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[3] PEI's wholly-owned subsidiary, the Playboy Programming Distribution Company of America, was added as a plaintiff by amendment. As no one has suggested any difference in their respective rights or positions in this suit, we refer to PEI and PPDCA collectively as "PEI."

(d) interfering with any programming carried on the Playboy Channel by intimidating or putting coercive pressure on members of the Cable Association.

The order left the Secretary of Justice free to prosecute *PEI* for obscenity based on its distribution of the Playboy Channel, and free to prosecute cable operators for *future* transmissions of the Playboy Channel. 698 F. Supp.. at 404-05. The plaintiffs' damage claims against the other defendants were "held in abeyance during the pendency of the equitable claims," by agreement of the parties and the court. 698 F. Supp. at 403. The plaintiffs also dropped their challenge to the constitutionality of Puerto Rico's obscenity statute, and agreed to the dismissal of the Commission as a party, leaving only the individual defendants. Addendum C to Appellants' Brief. The parties then each moved for summary judgment on the sole question of whether the federal Cable Act precludes local prosecution of the Puerto Rican cable operators for obscenity.

In an opinion and order dated October 31, 1988, Judge Pieras declared that one member of the Cable Association, the operating company Teleponce, Inc., carries the Playboy Channel on a channel obtained by PEI pursuant to 47 U.S.C. § 532. The court declared that prosecution of Teleponce for transmitting the Playboy Channel is prevented by § 558. The court also declared that should other members of the Cable Association likewise designate channel capacity under § 532, they would similarly be free from criminal and civil liability. The court then enjoined the defendants from initiating any prosecution against any member of the Cable Association based upon any video programming carried on the Playboy Channel. 698 F. Supp. at 419 From this order, the defendants appeal.[4]

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[4] The district court also held that the Puerto Rican obscenity statute and the Commission's Agreement Number 2 are not facially unconstitutional, although this claim has been dismissed by order dated August 31, 1987. Neither PEI nor the Cable Association challenges this holding, so we do not consider it on appeal.

The defendants do not challenge the district court's bedrock legal holding: that 47 U.S.C. § 558 precludes local prosecution of a cable operator for obscenity, based on programming transmitted by that operator over a channel obtained under § 532 or under similar arrangements. The defendants raise a host of preliminary issues, of which we address four, relying on Judge Pieras' fine opinion as adequate answer to the rest. Three issues are related: whether a private cause of action is available, and whether the plaintiffs have standing to bring this action. The defendants also challenge the district court's consideration on summary judgment of certain evidence that Teleponce had agreed to transmit the Playboy Channel on a channel obtained under § 532 or similar arrangement.

II. Subject Matter Jurisdiction[5]

The plaintiffs state that the district court had subject matter jurisdiction under 28 U.S.C. §§ 1331 and 1343. It seems clear that jurisdiction is not available under §§ 1343(3) and (4), the only provisions of § 1343 which might apply. These provisions do not provide jurisdiction for a § 1983 action asserting the preemption of state law by federal statute, when the preempting federal law is not one providing for equal rights or the protection of civil rights. *Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 612-20 (1979). The Cable Act probably does not qualify as a civil rights law. However, because Congress has eliminated the minimum amount in controversy requirement from the general federal question jurisdiction provision (§ 1331), there is no need to pursue an independent inquiry

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[5] *Our* jurisdiction to hear this appeal is not questioned, and seems proper. Along with declaratory and injunctive relief, the plaintiffs asked for damages. The presence of unresolved legal claims raises the question whether the district court's order of October 31, 1988 is final and appealable under 28 U.S.C. § 1291. However, regardless of the fate of the claim for damages, we have appellate jurisdiction under 28 U.S.C. § 1292(a)(1) to review the granting of injunctive relief.

of the scope of § 1343. *See* P. Bator, D. Meltzer, P. Mishkin, and D. Shapiro, Hart and Wechsler's *The Federal Courts and the Federal System* 1241 (3d ed. 1989) ("Hart and Wechsler's").

The defendants label the plainiffs' suit an inappropriate attempt "to use the declaratory judgment mechanism as a defensive preemptive strike," citing, among other cases, *Public Serv. Comm'n v. Wycoff Co.*, 344 U.S. 237 (1952). Although the defendants do not call it such, we consider this a challenge to the existence of federal question jurisdiction. The relevant language from *Wycoff* reads

> Where the complaint in an action for declaratory judgment seeks in essence to assert a defense to an impending or threatened state court action, it is the character of the threatened action, and not the defense, which will determine whether there is federal-question jurisdiction in the District Court. If the cause of action, which the declaratory defendant threatens to assert, does not itself involve a claim under federal law, it is doubtful if a federal court may entertain an action for a declaratory judgment establishing a defense to that claim. This is dubious even though the declaratory complaint sets forth a claim of federal right, if that right is in reality in the nature of a defense to a threatened cause of action. Federal courts will not seize litigations from state courts merely because one, normally a defendant, goes to federal court to begin his federal-law defense before the state court begins the case under state law.

344 U.S. at 248 (citations omitted). This court has followed this language in several cases. *See Greenfield and Montague Transp. Area v. Donovan*, 758 F.2d 22, 26-27 (1st Cir. 1985); *Nashoba Communications v. Town of Danvers*, 893 F.2d 435, 437-38 (1st Cir. 1990); *Colonial Penn Group,*

Inc. v. Colonial Deposit Co., 834 F.2d 229, 223 (1st Cir. 1987). The Supreme Court cited this passage with apparent approval in *Franchise Tax Board v. Laborers Vacation Trust Fund*, 463 U.S. 1, 16 (1983).

The plaintiffs presently are seeking declaratory and injunctive relief based on their claim that 47 U.S.C. § 558 provides cable operators the right to be free from obscenity prosecutions based on material transmitted over leased access channels—in effect, that the Cable Act partially preempts local obscenity statutes.[6] Phrased this way, the suit does seem to run afoul of the general principle that in a suit for declaratory judgment, federal question jurisdiction cannot be based solely on the raising of a federal defense to a state law cause of action. *Franchise Tax Board*, 463 U.S. at 16.[7]

Without explaining exactly why, the Supreme Court has recognized a relevant limitation to the application of the rule stated in *Wycoff*. In an action by a group of airlines for declaratory and injunctive relief against New York State officials claiming that ERISA preempted the New York Human Rights Law and Disability Benefits Law, the Court acknowledged the existence of federal question jurisdiction:

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[6] The preemption works as follows: section 556(c) of the Cable Act says that (with one exception) any state or local law "inconsistent with this chapter shall be deemed to he preempted and superseded." Section § 558 says that nothing in the Cable Act shall affect liability pursuant to federal, state, or local law of obscenity (and other subjects), except that cable operators shall not incur such liability for programming carried on a channel "obtained under § 532 of this title or under similar arrangements."

[7] Merely because an injunction as well as declaration of rights is sought does not distinguish this case from *Wycoff*. This court has held that when the injunctive relief sought in reality does no more than effectuate the declaratory judgment by preventing the application of state law, the *Wycoff* rule still applies. *Colonial Penn Group*, 834 F.2d at 236.

> It is beyond dispute that federal courts have jurisdiction over suits to enjoin state officials from interfering with federal rights. *See Ex parte Young*, 209 U.S. 123, 160-162 (1908). A plaintiff who seeks injunctive relief from state regulation, on the ground that such regulation is pre-empted by a federal statute which, by virtue of the Supremacy Clause of the Constitution, must previal, thus presents a federal question which the federal courts have jurisdiction under 28 U.S.C. § 1331 to resolve.

Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 96 n.14 (1983). The Court in *Shaw* distinguished *Franchise Tax Board*, which was decided the same day, by saying that case "was an action seeking a declaration that state laws were *not* pre-empted by ERISA. Here, in contrast, companies subject to ERISA regulation seek injunctions against enforcement of state laws they claim *are* pre-empted by ERISA, as well as declarations that those laws are pre-empted." *Shaw*, 463 U.S. at 96 n.14 (emphasis in original).

In two recent cases, this court has distinguished *Shaw* and applied the *Wycoff* rule. The plaintiff in the first, after having been sued in state court for state common law trade name infringement, brought a federal court action against its state court adversary, seeking a declaration and injunction, claiming that its rights under federal trademark law protected it from state law liability. *Colonial Penn Group*, 834 F.2d at 231-32. *Wycoff*, not *Shaw*, applied because the defendant in the federal declaratory suit was not enforcing a state regulatory scheme allegedly preempted by federal law, but was merely a private party claiming its rights under state law.

> Colonial Penn is not challenging a state regulatory system on the grounds that it is preempted by a parallel yet conflicting federal body of law. Penn is merely asserting that it has a federally

> protected mark that protects it against state common law infringement liability. . . . Jurisidiction over actions for declarations of pre-emption can logically only be asserted where a state official is the defendant.

834 F.2d at 237.

In *Nashoba Communications*, above, the defendant in the declaratory judgment action *was* a state actor—the Town of Danvers, which had granted Nashoba Communications a cable television franchise, and had demonstrated its intent to enforce a two-year "rate freeze" clause in its license agreement with the cable company. Nashoba Communications claimed that the Cable Communications Policy Act's provisions regarding rates preempted the license's "rate freeze" clause. However, since the Town was only claiming a right arising out of contract, rather than enforcing a regulatory scheme, the court held that *Shaw* did not apply. 893 F.2d at 440.

The *Wycoff* rule applied distinctions "involving perhaps more history than logic." *Franchise Tax Board*, 463 U.S. at 4. Although the meaningfulness of the distinction escapes us, we think this case is on its facts closer to *Shaw* than to *Colonial Penn Group* or *Nashoba Communications*.

Unlike the defendants in *Colonial Penn Group*, defendants here *are* state actors. And unlike *Nashoba Communications*, these state actors are not trying to enforce a single, negotiated contract term, but are allegedly waging a comprehensive campaign to rid the Commonwealth of Puerto Rico of cable transmission of the Playboy Channel. The control the defendants seek to impose on the content of cable transmissions is effectuated through a criminal statute. If such regulation is carried out by prosecution or threats of prosecution against cable operators who are transmitting the Playboy Channel over leased access channels, it is preempted by federal law. Therefore, this case neatly fits the situation described in *Shaw*: a

plaintiff seeking injunctive relief from a state enforcement action, on the ground that state law is preempted by a federal statute. *Shaw*, 463 U.S. at 96 n.14.

Additionally, although the plaintiffs have dropped their claims which rely explicitly on the First Amendment, we draw some comfort in our distinctions of *Colonial Penn Group* and *Nashoba Communications* from the willingness of federal courts, including the Supreme Court, to entertain declaratory and injunctive actions against prospective enforcement of state law which threatens to discourage expression.. *See, e.g., Steffel v. Thompson*, 415 U.S. 452 (1974); *Epperson v. Arkansas*, 393 U.S. 97 (1968); *Dombrowski v. Pfister*, 380 U.S. 479, 490 (1965); *Wulp v. Corcoran*, 454 F.2d 826, 831 (1st Cir. 1972).

III. The Availability of a Federal Cause of Action

The defendants, without adequately segregating them, raise two analytically distinct arguments. They question whether there is a federal cause of action, either under § 1983 or implied in the Cable Act, to support this lawsuit. They also question, assuming that a federal cause of action is available, whether PEI or the Cable Association (rather than the individual cable operators who were subject to the threats of prosecution) are proper parties to bring this suit; that is, whether these plaintiffs have standing to sue. Putting aside for the moment the question of plaintiffs' standing, we address the issue of the availability of a federal cause of action.

The district court found that the Cable Act implies a private cause of action under the four-part analysis of *Cort v. Ash*, 422 U.S. 66 (1975). 698 F. Supp. 410-414. Because we hold that 42 U.S.C. § 1983 provides the plaintiffs with a right of action against the defendants, we need not consider whether a private cause of action is implied in the Cable Act. *See Samuels v. District of Columbia*, 770

F.2d 184, 194 (D.C. Cir. 1985); *Lynch v. Dukakis*, 719 F.2d 504, 510 (1st Cir. 1983).

Section 1983 provides legal and equitable remedies against any person who, under color of state or territorial authority, deprives "any citizen of the United States or other person within the jurisdiction thereof" of "any rights, privileges, or immunities secured by the Constitution and laws."[8] The provision provides a remedy only for deprivations, by state actors, of rights, privileges or immunities created by federal law. It does not create a right of action for all violations of federal law. *Golden State Transit Corp. v. City of Los Angeles*, 110 S. Ct. 444, 448 (1989). Federal rights, privileges and immunities which can be vindicated under § 1983 can be created by statute as well as the Constitution. *Maine v. Thiboutot*, 448 U.S. 1, 4 (1980).

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[8] Section 1983 reads in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress. . . .

Relying in part on *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663 (1973), which held that Puerto Rico's laws are "State statutes" for purposes of the Three Judge Act, 28 U.S.C. § 2281, this Circuit considers Puerto Rico a "State" within the meaning of § 1983. *Ortiz v. Hernandez Colon*, 551 F.2d 1080, 1081-83 (1st Cir. 1975), *vacated and remanded on other grounds*, 429 U.S. 1031 (1977); *Berrios v. Inter Am. University*, 535 F.2d 1330, 1331 (1st Cir. 1976). For this reason, and because at this point plaintiffs seek only injunctive relief, not damages which might threaten the Commonwealth's treasury, this case is not controlled by the Supreme Court's recent decision in *Ngiraingas v. Sanchez*, 58 U.S.L.W. 4504 (1990), which held that because the Territory of Guam is not a "person" under § 1983, plaintiffs could not maintain a § 1983 damage action against Guam officials acting in their official capacities.

The Supreme Court has recognized two narrow exceptions to the general availability of § 1983 to remedy the deprivation, by state actors, of federal rights. First, there is no "right" enforceable under the statute if the substantive federal provision merely "express[es] a congressional preference for certain kinds of treatment," rather than imposes binding obligations on the states, or if the asserted federal interest is so "vague and amorphous" that it is "beyond the competence of the judiciary to enforce." *Golden State Transit Corp.*, 110 S. Ct. at 448 (quoting *Pennhurst State School v. Halderman*, 451 U.S. 1, 19 (1981) and *Wright v. Roanoke Redev. & Housing Auth.*, 479 U.S. 418, 431-32 (1987)). "Second, even if the plaintiff has asserted a federal right, the defendant may show that Congress 'specifically foreclosed a remedy under § 1983' by providing a 'comprehensive enforcement mechanis[m] for protection of a federal right.' " *Id.* (quoting *Smith v. Robinson*, 468 U.S. 992, 1004 n.9, 1003 (1984).)[9]

We have no doubt the protection from liability provided cable operators by § 558 for the content of leased access channel programming is an "immunity" created by federal law and enforceable by the courts. Section 558 uses unequivocal, mandatory language: "cable operators shall not

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[9] The Supreme Court has noted in dictum that it has also asked, when deciding whether a § 1983 action is available, whether the provision creating the federal right was "intended to benefit the putative plaintiff." *Golden State Transit Corp.*, 110 S. Ct. at 448 (citations omitted). The Court has yet to find § 1983 unavailable for this reason, and there is no indication that this dictum is any more than a recognition of the general rule of *jus tertii* we address in Section IV below: that a party cannot, absent certain circumstances, raise the rights of another. Certainly the language of § 1983 itself does not restrict a plaintiff to asserting only its own rights—the statute provides legal and equitable relief to "*the person injured*" by the deprivation of the federal rights of "*any* person." Moreover, such a restriction would be contrary to a number of cases which recognize third party and associational standing in § 1983 suits. See *e.g.*, *Hunt v. Washington Apple Advertising Comm'n*, 432 U.S. 333 (1977).

incur any liability for any program" carried on any public, educational, governmental or leased access channel. This immunity can be protected effectively by enjoining prosecution.

The defendants point out that the statutory immunity derives its preempting force through the Supremacy Clause, and that the Supremacy Clause *itself* does not provide a substantive federal right enforceable under § 1983. This is immaterial, so long as the preempting federal statute does provide such a right. "In all cases," the availability of § 1983 depends on whether the statute creates specific and enforceable obligations. *Golden State Transit Corp.*, 110 S. Ct. at 449.

We are also unconvinced by the defendants' argument that resort to § 1983 is precluded by the Cable Act itself. "[I]f there is a state deprivation of a "right" secured by a federal statute, § 1983 provides a remedial cause of action unless the state actor demonstrates by express provision or other specific evidence from the statute itself that Congress intended to foreclose such private enforcement." *Wright*, 479 U.S. at 423. The Cable Act does not expressly preclude actions brought under § 1983. However, it does contain certain private remedies and the defendants claim these constitute a "multitiered, comprehensive and elaborate enforcement and remedial scheme." For example, the Cable Act provides for civil actions against cable operators who violate its protection of subscriber privacy, and against persons who violate its prohibition against unauthorized reception of cable service. 47 U.S.C. §§ 551(f), 553(c). Also, any person aggrieved by the failure of a cable operator to make channel capacity available for use pursuant to § 532 may either bring a civil action to compel such access, or petition the FCC for relief upon a showing of prior adjudicated violations. § 532(d) & (e). Cable operators can get judicial review of adverse decisions made by franchise authorities concerning the modification or renewal of franchise obligations. 47 U.S.C. § 555. The Cable

Act grants franchising authorities the power to enforce consumer protection provisions included in franchise agreements, and has detailed procedures for enforcing the Act's equal employment requirements. 47 U.S.C. §§ 552(b), 532(g), 533(c) & 554.

The sum of these remedial provisions hardly creates a "comprehensive remedial scheme" leaving "no room for additional private remedies under § 1983" which is essential to finding an implied Congressional intent to preclude § 1983. *Wright*, 479 U.S. at 423. Most importantly, none of these provisions affords a remedy against state actors (other than the franchise authority) who might encroach on rights guaranteed by the Cable Act, because the Cable Act's remedies are aimed either at private conduct regulated by the Act, or at the cable franchise authority. For certain, a statute's express remedies need not be as comprehensive or efficient as § 1983 in order to evince an intent to preclude use of § 1983. *Middlesex Cty. Sewerage Auth. v. Sea Clammers*, 453 U.S. 1, 14, 19-21 (1981) (the availability of private injunctions under the federal water pollution acts precludes private § 1983 damage suit). *But see Lynch*, 719 F.2d at 510-11 (Secretary of HEW's power to withhold funds from states which do not comply with provisions of Social Security Act is insufficient to show congressional intent to preclude § 1983 action). Yet, it seems clear that before one can conclude that Congress meant to displace a § 1983 suit with a particular remedial scheme, that scheme must at least serve to protect the federal right created in the statute and at issue in the case.

In *Sea Clammers*, the injunctions available to private parties, and the available agency enforcement powers, worked to protect the same federal right the plaintiffs seeking damages wanted to vindicate. 453 U.S. at 13-15. No similar provision in the Cable Act creates a procedure to guarantee that cable operators transmitting programs via leased access channels will not be prosecuted by local

authorities. Thus, entertaining a § 1983 action does not "render superfluous most of the detailed procedural protection outlined in the statute." *Smith v. Robinson*, 468 U.S. at 1011-12. The defendants have not met their burden of demonstrating that Congress meant to preclude resort to § 1983 to protect the cable operator's immunity under § 558. *See Wright*, 479 U.S. at 423.

IV. Standing

The defendants argue that neither the Cable Association nor PEI has standing to bring this suit. Their separate challenges to the two plaintiffs' standing share the same core: whether a cable programmer or an association of cable operators can properly bring suit based on what the defendants consider to be an individual right of the cable operators.

A. The Cable Association

The district court held that because the Cable Association alleged no injury to itself caused by the defendants, it did not have standing to sue on its own behalf. 698 F. Supp. at 413-14. This ruling is not challenged on appeal. The court did hold, however, that the Cable Association had standing to sue on behalf of its members. *Id.* at 414.

The parties and the district court agreed that the relevant test was stated in *Hunt v. Washington Apple Advertising Comm'n*:

> [A]n association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.

432 U.S. 333, 343 (1977). Applying this test, Judge Pieras decided, first, that "the record before the Court, including the stipulations of the parties, reveals that any member of [the Cable Association] could have brought this action and would have alleged a particularized harm sufficient to give that member-standing." 698 F. Supp. at 414. He next found that the organizational purposes of the Association had been sufficiently pled, and "that these avowed purposes are consonant with the relief requested and the interest sought to be protected in the suit." *Id.* Third, he decided that "[t]he claim asserted and the relief requested, at this stage of the litigation, do not require the participation of the individual [Association] members," and that "the relief requested here runs to all [Association] members equally: protection from local prosecution. No individualized evidence is required." *Id.* The defendants challenge the district court's determination on all three elements of the *Hunt* test.

First, the defendants note that this suit no longer contains a challenge to the constitutionality of Puerto Rico's obscenity statute; only the statutory preemption claim remains. The defendants then argue that Teleponce is the only member of the Cable Association claiming to have designated a channel for commercial use under § 532, so it is the only member which can assert an immunity from prosecution based on § 558. Without disputing that Teleponce itself would have had standing to sue, they argue that the prospective standing of a single member cannot support standing for the Cable Association to sue on behalf of its members.

We think the defendants' assertion that, because other members have not yet designated a leased access channel they lack standing, confuses merits and standing. Certainly, the members of the Association who have dropped transmission of the Playboy Channel on account of threats of prosecution have suffered an injury directly traceable to the defendants' actions, *see Valley Forge College v.*

Americans United, 454 U.S. 464, 472 (1982); whether or not they are entitled to the protection from prosecution offered by § 558 is part of the merits of their claim, not their standing to sue. In any event, the Supreme Court has never required that *every* member of an association have standing before it can sue on behalf of its members. "The association must allege that its members, *or any one of them*, are suffering immediate or threatened injury as a result of the challenged action of the sort that would make out a justiciable case had the members themselves brought suit." *Warth v. Seldin*, 422 U.S. 490, 511 (1975) (emphasis added) (citing *Sierra Club v. Morton*, 405 U.S. 727, 734-35 (1972), which held that the Sierra Club lacked standing to challenge the U. S. Forest Service's approval of development in the Mineral King Valley because the Club didn't allege that any of its members use the area for recreation). In *Automobile Workers v. Brock*, the Court held that the first element of the *Hunt* test was met when the plaintiff association showed that "at least some" of its members would have had standing to sue on their own. 477 U.S. 274, 286 (1986). Teleponce's prospective standing is enough to satisfy the first element of *Hunt*.

Next, the defendants claim that in reality, the Cable Association is just an "empty husk of an association with no public identity" which is controlled by PEI for its own interests, not the interests of the members. The record does not support this accusation.

The record evidence shows that the Cable Association was organized prior to the filing of this suit, and for different reasons, Appellants' Appendix (AA) at 57; that the members of the Association twice unanimously consented to the Association's participation in the suit (one member later demurring), *Id.* at 58; and that PEI does not own or control the Cable Association, or any of its members. SA at 72. The defendants point out that PEI is bearing the expenses of this litigation, but this doesn't show that the Association is a pawn of PEI or that it is not rep-

resenting its members' true interest. If the members felt their interests were not being served by this suit, they could vote to end the Association's involvement.

A more difficult question is posed by the third prerequisite for an association to sue on behalf of its members: that "neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." The defendants argue that because this lawsuit requires the participation of Teleponce, the Association lacks standing.

We can easily find that the plaintiffs' request for *declaratory* relief—that the Cable Act prevents local prosecution of cable operators for programing transmitted over leased access channels—does not require any individual member's participation as a party. Such declaratory relief turns on a question of law which is not particular to each member of the Association, and because the declaration applies equally to all members of the Association, there is no need for individual proof or participation. *Brock*, 477 U.S. at 287 (no need for members' participation when suit raises a "pure question of law" not individual to members, even though later proceedings might require individualized consideration). The same is true for injunctive relief which parallels the declaration. Although not every member may derive any immediate benefit from he injunction, no individual findings are necessary, and "it can reasonably be supposed that the remedy, if granted, will inure to the benefit of those members of the association actually injured." *Warth*, 422 U.S. at 515. *See Camel Hair and Cashmere v. Associated Dry Goods*, 799 F.2d 6, 12 (1st Cir. 1986).

A different part of the claim asserted does depend upon proof which may vary from member to member, however. The complaint asked the district court to *enjoin* the defendant from prosecuting or threatening to prosecute "cable operators" generally. This claim is now solely based

upon the immunity from prosecution found in § 558. The district court made an individualized determination when it declared that Teleponce carries the Playboy Channel pursuant to § 532. 698 F. Supp. at 419. This declaration was based upon the court's review of communications between PEI and Teleponce, evidence which could not have established whether any other member of the Association had similarly designated a channel for leased access. *Id.* at 416-18.

But just because a claim may require proof specific to individual members of an association does not mean the members are required to participate *as parties* in the lawsuit. In *Warth*, the Supreme Court held that an association had no standing to sue on behalf of its members, when seeking monetary relief to compensate its members' injuries. The Court said

> whatever injury may have been suffered is peculiar to the individual member concerned, and both the fact and extent of injury would require individualized proof. Thus, to obtain relief in damages, each member of Home Builders [Association] who claims injury as a result of respondents' practices must be a party to the suit, and Home Builders has no standing to claim damages on his behalf.

422 U.S. at 515-16. The crucial reason for *requiring* the members' participation as parties must have been so that the members could recover their own damages, should they prevail. The Home Builders Association, having alleged no injury to itself nor any assignment of damage claims by its members, was not entitled to be compensated for the various injuries suffered by its members. *Id.* at 515. The members' participation *as parties* was necessary so that judgment could be entered in their favor, not in order to prove individual damages. The members could still have been called to testify as to their damages, and could have

been deposed and subjected to subpoenas *duces tecum* by the defendants without being parties to the suit. Fed. R. Civ. P. 30 & 45.

We see no reason why the claim for injunctive relief in this case *requires* the participation of any Cable Association member, or how Teleponce's participation as a party would make any significant difference. No monetary judgment was granted, either on behalf of the Cable Association or its members.[10] The defendants do not claim that because Teleponce is not a plaintiff, they have been unable to gain access to evidence concerning the single individual issue, whether or not Teleponce has designated for commercial use the channel over which it transmits the Playboy Channel. The defendants, in fact, agreed to submit the case for decision on summary judgment without claiming there was a genuine issue of fact, only contesting the evidence the court could consider in resolving this issue. Therefore, we hold that the district court did not err in finding that Cable Association has standing to bring this suit on behalf of its members.

B. PEI

PEI faces a different standing test from the Cable Association, since it does not claim to be suing on behalf of the cable operators. To have standing, PEI must first satisfy what faces all parties bringing suit in federal court--Article III's limitation of federal court jurisdiction to the resolution of "Cases" or "Controversies." PEI must show (1) an actual or threatened injury suffered as a result of the putatively illegal conduct of the defendants, (2) that its injury "fairly can be traced to the challenged action," and (3) that this injury is likely to find redress in a favorable decision. *Valley Forge College*, 454 U.S. at 472.

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[10] The plaintiffs' damage claims have been held in abeyance, and are not before us. We express no opinion on the Association's standing to pursue these claims on behalf of itself or its members.

The defendants' brief does not challenge PEI's standing under Article III, except perhaps with an oblique statement which might be read to question whether the remedy sought will benefit PEI: the defendants claim "the Playboy plaintiffs would not derive any direct benefit from [this] action, since Section 558 does not afford them any shield from obscenity prosecution." Appellants' Brief at 13. The plaintiffs' complaint alleges that PEI loses money and suffers intangible losses when cable operators stop transmitting the Playboy Channel, and that cable operators will drop the Playboy Channel rather than face an obscenity prosecution. SA at 13, 19. The parties have stipulated that Teleponce had a reasonable fear of such prosecution. *Id.* at 60. Regardless of whether PEI may later face its own obscenity prosecution, an injunction against prosecution of Teleponce will effectively remove an imminent financial threat to PEI. Article III does not prevent the court from addressing PEI's claim.

What the defendants *do* challenge at length is what they characterize as PEI's basing a suit entirely on the legal right of a third person. This invokes the prudential, discretionary limit federal courts have imposed on their exercise of Article III powers—the rule against *jus tertii* standing. A plaintiff generally must assert its own legal rights, without resting its claim for relief on the rights of third parties. *Secretary of State of Md. v. J. H. Munson Co.*, 467 U.S. 947, 955 (1984); *Warth*, 422 U.S. at 499. *See generally*, H. Monaghan, Third Party Standing, 84 Colum. Law Rev. 277 (1984).

PEI, as did the district court, relies on *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963), as an answer to this problem. In *Bantam Books*, four out-of-state book publishers sued to enjoin the actions of Rhode Island's Commission to Encourage Morality in Youth, claiming that the Commission's notification to local distributors that it found certain of the publisher's books to be "objectionable" violated the First Amendment and was causing the publish-

ers economic harm. The Court recognized the publishers' right to sue even though none of the Commission's actions were directed toward them. *Id.* at 64-54 n.6. PEI analogizes itself to the publishers and Teleponce to the distributors, claiming that *Bantam Books* establishes its standing.

Bantam Books alone cannot support PEI's claim of standing. The Supreme Court plainly stated that the publishers in *Bantam Books* were asserting their *own* first amendment rights, not the distributors':

> "[A]ppellants are not in the position of mere proxies arguing another's constitutional rights. The constitutional guarantee of freedom of the press embraces the circulation of books as well as their publication, and the direct and obviously intended result of the Commission's activities was to curtail the circulation in Rhode Island of books published by the appellants."

Id. (citations omitted). At this point in its suit, PEI is not asserting the first amendment rights of anyone. PEI does not claim, although perhaps it could, that threats to prosecute a cable operator under an obscenity statute which is effectively preempted by federal law violates its own first amendment rights. Its claim for relief now depends entirely upon the immunity from prosecution provided by the Cable Act. The defendants argue that this immunity is personal to the cable operator, and does not and is not intended to benefit the cable programmer.

The rule against *jus tertii* standing is not absolute. The Supreme Court has recognized the ability of plaintiffs to raise the rights of others in many cases. "[T]here are situations where competing considerations outweigh any prudential rationale against third-party standing, and . . . this Court has relaxed the prudential-standing limitation when such concerns are present." *J. H. Munson Co.*, 467 U.S. at 956. When a special relationship exists between

the plaintiff and the third party whose rights are allegedly infringed, so that the infringement of the third parties' rights restricts the plaintiff's own rights, *jus tertii* standing may be appropriate. *E.g., Caplin & Drysdale, Chartered v. United States*, 109 S. Ct. 2646, 2651 n.3 (1989); *Eisenstadt v. Baird*, 405 U.S. 438, 443-46 (1972). Also,

> Where practical obstacles prevent a party from asserting rights on behalf of itself, for example, the Court has recognized the doctrine of *jus tertii* standing. In such a situation, the Court considers whether the third party has sufficient injury-in-fact to satisfy the Art. III case-or-controversy requirement, and whether, as a prudential matter, the third party can reasonable be expected properly to frame the issues and present them with the necessary adversarial zeal. *See, e.g., Craig v. Boren*, 429 U.S. 190, 193-194 (1976).

J. H. Munson Co., 467 U.S. at 956. Both of these considerations are present here.

First, there is a unique, reciprocal relationship between the cable operator's statutory immunity, upon which PEI bases its suit, and PEI's own statutory right to mandatory access. Narrowly viewed, of course, § 558 protects only cable operators from liability, not programmers like PEI. Nevertheless, the cable operator's immunity benefits the leased access programmer in a very real sense--by helping guarantee its statutory right to access part of the operator's channel capacity.[11]

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[11] Of course, PEI has no right of access to transmit obscenity, and the Cable Act expressly retains and provides for liability for programmers who transmit obscenity. 47 U.S.C. § 558; 559. PEI stoutly asserts that the Playboy Channel is not obscene, however, and the transmissions are presumed protected until proven otherwise. Plaintiff Playboy Distribution Company has agreed to submit to personal jurisdiction in a prosecution for violation of Puerto Rico obscenity statutes, an action which apparently has not yet been brought.

Congress provided for compelled access in order "to assure that cable systems provide the widest possible diversity of information services and sources to the public, consistent with the First Amendment's goal of a robust marketplace of ideas. . . ." House Rep. 84-934 at 19; 1984 U.S. Code and Admin. News at 4656. *See* 47 U.S.C. § 532(a). Congress also recognized that a necessary concomitant to forced access and loss of editorial control is the cable operator's immunity from liability. *Id.* at 95; 1984 U.S. Code and Admin. News at 4732. (The defendants seem to concede that this immunity is essential to effectuate the mandatory access provision. Appellants' Brief at 44.) Without this protection, cable operators would face a legislatively-mandated, undeterminable exposure to both civil and criminal liability. Faced with such a threat, operators would likely resist any forced access, either by colluding with unobjectionable, safe programmers to fill up the required percentage of mandatory access channels, or by avoiding being subject to forced access by maintaining less than thirty-six activated channels. This would defeat the basic purpose of the mandatory access provisions by encouraging cable operators to maintain their monopoly power over the content of programming transmitted. With the immunity in place, however, the cable programmer's access is more secure, since it removes a strong incentive not to grant access. Prosecuting, or threatening to prosecute a cable operator for the content of leased access channel programming despite the immunity poses the same threat to the programmer's right to compelled access as if there was no statutory immunity in the first place.

Second, the plaintiffs' complaint alleges that cable operators will drop their carriage of the Playboy Channel rather than defend an obscenity prosecution. *J. H. Munson Co.* recognized that when the individuals who are engaging in allegedly protected activity are reluctant to raise their own rights in the face of threatened official sanctions, this

presents a practical obstacle which permits third party standing. 467 U.S. at 956.

We see no reason to thing that PEI is not an effective advocate of the cable operator's rights. Unlike the plaintiff in *Friedman v. Harold*, 638 F.2d 262 (1st Cir. 1981), who sought to assert the right of a third party to the actual detriment of the right-holder, PEI's assertion of the § 558 immunity is in the cable operator's interest. *See American Library Ass'n v. Odom*, 818 F.2d 81 (D.C. 1987) (plaintiff researchers who failed to show community of interests between themselves and library could not assert library's property rights). The community of interests between the operators and PEI in this suit is shown by the Cable Association's presence as co-plaintiff, and the operators' assent to the Association's participation as their representative.

Finally, although the defendants do not make an issue of it, we note that the Cable Act does provide a cause of action in favor of persons aggrieved by the failure or refusal of a cable operator to make channel capacity available according to § 532.[12] It is arguable that cable programmers

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[12] Section 532(d) provides that

> Any person aggrieved by the failure or refusal of a cable operator to make channel capacity available for use pursuant to this section may bring an action in the district court of the United States for the judicial district in which the cable system is located to compel that such capacity be made available. If the court finds that the channel capacity sought by such person has not been made available in accordance with this section, or finds that the price, terms, or conditions established by the cable operator are unreasonable, the court may order such system to make available to such person the channel capacity sought, and further determine the appropriate price, terms or conditions for such use consistent with subsection (c) of this section, and may award actual damages if it deems such relief appropriate. In any such action, the court shall not consider any price, term, or con-

should be required to use this remedy to vindicate their right of access, rather than basing a § 1983 suit on the statutory immunity of the cable operators. However, the Cable Act's legislative history indicates that Congress included § 532(d) & (e) to prevent cable operators, who might naturally be reluctant to provide leased access capacity, from frustrating the leased access provision through subterfuge. House Rep. 84-934 at 50, 54-55; 1984 U.S. Code and Admin. News at 4687, 4691-92. Nowhere in its discussion of these provisions does the House Report address the threat to the goals of the leased access provision which can be posed from outside parties such as state enforcement agencies.

At this point, the question of standing and the previously considered question of the availability of § 1983 relief become quite close. As noted in Section III above, when a federal provision which creates a right at the same time provides a means for vindicating that right, Congress may have intended to preclude resort to § 1983. However, because the remedy created by § 532(d) & (e) protects the cable programmer's right of access against the cable operator, but does not protect the operator's § 558 immunity from prosecution by outside parties, it is not the "comprehensive remedial scheme" which might show a legislative intent to make § 1983 unavailable. *See, e.g., Chapman*, 441 U.S. at 612-20. Like the district court, *see* 698 F. Supp. at 410-11, we find no indication that Congress intended § 532(d) & (e) to be the programmer's sole means of recourse when its right to access is threatened. Since PEI's § 1983 suit against the defendants is not inconsistent with the scope or purpose of the right of action granted it against cable operators, we see no reason to restrict PEI to that remedy.

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dition established between an operator and an affiliate for comparable services.

In summary, then, because the threat to the cable operator's immunity posed by local prosecution also threatens PEI's statutory right of access, and because PEI has alleged a reluctance on the part of the operators to defend their rights based on their statutory immunity, PEI has standing to raise the cable operator's immunity.[13]

V. The Evidence of an Oral Designation Pursuant to § 532

In support of their motion for summary judgment, the plaintiffs submitted to the district court a statement of facts they claimed were not in dispute. In it, the plaintiffs claimed that in April of 1987, Teleponce received from PEI's counsel an oral request for commercial access to the channel over which the Playboy Channel was being transmitted pursuant to § 532. The Plaintiffs further claimed that Teleponce orally agreed to this request, and orally designated the channel on which the Playboy Channel is transmitted as a leased access channel. SA at 174.

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[13] A question could be raised whether this case even presents a third party standing issue. Prosecution of cable operators in spite of the immunity created by § 558 effectively restricts PEI's statutory right of access, so why isn't PEI actually suing to protect its *own* right? Professor Monaghan has noted that "many *jus tertii* claims might be understood to involve the litigant's own rights, not those of third persons, even though the impact of the [state action] on third persons must be considered in order to adjudicate the litigant's own claims." Monaghan, Third Party Standing, 84 Colum. Law Rev. at 297. He argues that when a third party's rights are threatened in a manner that impairs its interaction with the plaintiff or "first" party, the first party may assert, as its own, the right to be free from the interference. *Id.* at 303. He argues that "a litigant asserts his own rights (not those of a third person) when he seeks to avoid restrictions that directly impair his freedom to interact with a third person who himself could not be legally prevented from engaging in the interaction." *Id.* at 299-301. This analysis strongly suggests that when a third party's right or immunity directly benefits the party claiming standing, that party has standing to sue on its own behalf, and need not establish an exception to the *jus tertii* prohibition. *See also* Hart and Wechsler's at 174 & n.7.

This allegation was supported by a letter from PEI to Teleponce, dated July 22, 1987, confirming the agreement, an affirmation of Mr. Gonzalez, and by the Association's response to interrogatories. SA 90-91, 167-68. In their "Opposition to Statement of Material Facts" submitted with their summary judgment motion, the defendants stated that they "did not accept as uncontroverted" this allegation of fact because it was supported by "hearsay evidence which could not be admissible at trial," citing *Walling v. Fairmont Creasmy Co.*, 139 F.2d 318 (8th Cir. 1943). Addendum D to Appellants' Brief at 1. The district court nonetheless went ahead and considered as true the plaintiffs' affirmations about the oral agreement between Teleponce and PEI, when finding that § 558 preempted prosecution of Teleponce because it had designated the relevant channel under § 532 or other similar arrangement. 698 F. Supp. at 418.

The defendants argue on appeal that the district court erred in concluding on summary judgment that Teleponce transmits the Playboy Channel over a channel obtained under § 532. While the defendants refer to their earlier objection in the district court, this objection is not the basis for their present argument. Instead, they now argue that there was a genuine issue of fact as to the truth of PEI's evidence, and so the district court should not have relied on that evidence in granting summary judgment.

When one party has properly supported a motion for summary judgement, the opposing party must "set forth specific facts showing that there is a genuine issue for trial." *Anderson v. Liberty Lobby Inc.*, 477 U.S. 242, 248 (1986) (quoting *First Nat. Bank v. Cities Service*, 391 U.S. 253, 288-89 (1968)). The defendants did not submit any evidence which contradicted the plaintiffs' proof. However, they argue that, based on surrounding circumstances of the affirmations, the affirmations which support PEI's claim of an oral modification are not credible.

We may assume that in a proper case, an opponent of summary judgment can show a genuine issue of material fact without introducing evidence in direct contradiction to a fact presented by the movant, but by showing the existence of specific facts which would give a reasonable jury cause to disbelieve assertions supporting the movant's version. *See* J. Moore and J. Wicker, 6A *Moore's Federal Practice* 56.15[4] at 56-298-99 (1988); C. Wright, A. Miller, M. Kane, 10A *Federal Practice & Procedure* § 2726 (1990 Supp.). *Cf. Nat. Union Fire Ins. Co., Etc. v. Argonaut Ins. Co.*, 701 F.2d 95, 97 (9th Cir. 1983) ("[N]either a desire to cross-examine an affiant nor an unspecified hope of undermining his or her credibility suffices to avert summary judgment."); *Soar v. National Football League Players' Association*, 550 F.2d 1287, 1289 n.4 (1st Cir. 1977) ("A court is not obliged to deny an otherwise persuasive motion for summary judgment 'on the basis of a vague supposition that something might turn up at the trial,' " (quoting *Lundeen v. Cordner*, 354 F.2d 401, 408 (8th Cir. 1966))).

We need not, however, decide defendants' present challenge to the credibility of the assertions of oral modification presented by plaintiffs, because they made no such point before the district court. The defendants objected to the district court's reliance on the assertions of an oral modification only on the ground that they would be inadmissible at trial as hearsay. They have not pressed this argument on appeal, but instead raise a different one not presented to the district court. Issues not raised before the trial court are waived on appeal, *Cookish v. Cunningham*, 787 F.2d 1, 6 (1st Cir. 1986) (*per curiam*), absent unusual circumstances or plain error suggesting that a "clear miscarriage of justice" has occurred. *Brown v. Trustees of Boston University*, 891 F.2d 337, 359 (1st Cir. 1989); *Gay v. P. K. Lindsay Co., Inc.*, 666 F.2d 710, 712 n.1 (1st Cir. 1981), *cert. denied*, 456 U.S. 975 (1982). The defendants do not say why this issue could not have been

raised before the trial court, and we perceive no miscarriage of justice in the district court's consideration of the plaintiffs' affirmations.

Even if the defendants had not waived this issue by failing to raise it before Judge Pieras, they waived it by raising it too late on appeal. The defendants only got around to challenging the credibility of the plaintiffs' affirmations in their reply brief. An appellant waives any issue which it does not adequately raise in its initial brief, because in "preparing briefs and arguments, an appellee is entitled to rely on the content of an appellant's brief for the scope of the issues appealed." *Pignons S.A. de Mecanique v. Polaroid Corp.*, 701 F.2d 1, 3 (1st Cir. 1983) (citations omitted). *Accord Wells Real Estate v. Greater Lowell Bd. of Realtors*, 850 F.2d 803, 811 (1st Cir.), *cert. denied*, 109 S. Ct. 392 (1988). We realize that the appellees voluntarily responded to this newly-raised issue in a "surreply" brief which we granted leave to file. However, in order not to encourage endless rounds of briefing, we still find the issue waived. *See Gold v. Wolpert*, 876 F.2d 1327, 1331 (7th Cir. 1989).

VI. The Breadth of the Injunction

Ruling for the plaintiffs, Judge Pieras entered a declaratory judgment which stated that Teleponce carries the Playboy Channel over a leased access channel, and that prosecution of it, and of other members of the Association who might later designate channels pursuant to § 532, is preempted by § 558. He also enjoined the defendants (and their agents, employees, successors and persons in concert with them) from initiating prosecution against *any* member of the Cable Association based upon *any* video programming carried on the Playboy Channel. An injunction of this breadth was agreed to by the parties as to transmission prior to June 3, 1987, the date of the agreed order. As to transmissions on or after that date, the injunction

must be limited to prosecution for transmission on any channel obtained under 47 U.S.C. § 532.

VII. Conclusion

The district court had federal question jurisdiction over plaintiffs' § 1983 action. Plaintiff Cable Association has standing to bring this suit on behalf of its members, and plaintiff PEI has standing to assert the statutory immunity from prosecution of cable operators who carry the Playboy Channel over a leased access channel. The defendants have waived any objection to the district court's reliance on the plaintiffs' submitted evidence of an oral agreement between PEI and Teleponce to carry the Playboy Channel over a channel designated pursuant to § 532. The injunction against initiating prosecutions is modified so that as to video programming carried on or after June 3, 1987, the injunction is limited to transmissions on any channel obtained under 47 U.S.C. § 532 or under similar arrangements, and as so modified the entire judgment appealed from is AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO

CIVIL NO. 87-0611 (JP)

PLAYBOY ENTERPRISES, INC., and PUERTO RICO CABLE TELEVISION ASSOCIATION, on its own behalf and on behalf of its members

Plaintiffs

vs.

PUBLIC SERVICE COMMISSION OF PUERTO RICO; ANGEL ALMODOVAR CORREA; RUBEN VILLALBA OLIVO; JOSE CIMA DE VILLA; MARIA CANCEL ALEGRIA; RUBEN RIVERA GARCIA; HON. HECTOR RIVERA CRUZ, Secretary of Justice of Puerto Rico, and ANGEL E. ROSA ROSA

Defendants

OPINION AND ORDER

On September 30, 1986, the Legislature of Puerto Rico passed Act Number 3 of the Seventh Special Session of the Tenth Legislature of the Commonwealth of Puerto Rico. Act No. 3 amended the Penal Code of Puerto Rico by extending coverage of the definitions of "obscene material" and "distribution of obscene material" to include depictions and transmissions via cable television. Transmission of obscene material was made punishable by up to four years' imprisonment, and a $50,000.00 fine, depending on whether there were repeated violations and aggravating circumstances.

Subsequent to the Passage of Act No. 3, the Commission issued "Agreement Number 2," in which the Commission

adopted, on the administrative level, the prohibitions enacted by the Legislature. The Commission, having franchising authority over cable television operators in Puerto Rico, set forth the possible sanctions for violation of the anti-obscenity statute. These sanctions were suspension or revocation of the franchise license and fines.

In late March, 1987, a prosecutor of the Department of Justice of the Commonwealth of Puerto Rico, defendant Rosa, contacted individual cable operators around Puerto Rico to inform them that he was preparing to file criminal complaints against them and their companies alleging transmission of obscene material over their respective cable systems. In the face of impending criminal obscenity charges, several cable operators terminated their contracts with the appropriate subsidiary of PEI and discontinued carriage of The Playboy Channel. This lawsuit followed.

Plaintiffs in this case are Playboy Enterprises, Inc. (PEI), the Playboy Programming Distribution Corporation (PPDC), and the Puerto Rico Cable Television Association (PRCTA). Defendants are the individual members of the Public Service Commission (PSC) of Puerto Rico in their official capacities, the Secretary of Justice of Puerto Rico, and a prosecutor from the Justice Department, Angel Rosa Rosa. The suit seeks relief against the Commission and the Justice Department to declare Act No. 3 unconstitutional, to enjoin criminal prosecution under the statute, and to enjoin the Commission from suspending or revoking the franchise of any cable operator both on constitutional grounds and on the grounds that local criminal prosecution of cable operators is preempted by the Cable Communications Policy Act (CCPA) of 1984, 47 U.S.C. §§ 521-559. The suit also seeks damages related to the claim that certain cable operators and PEI as well as PPDC suffered losses after discontinuing carriage of the Playboy Channel in the face of the prosecutor's threats of criminal prosecution. By agreement of the parties and with the consent

of the Court, these legal claims have been held in abeyance during the pendency of the equitable claims.

I. VIABILITY OF SUIT UNDER 42 U.S.C. § 1983

Plaintiffs claim that this Court has jurisdiction under the civil rights statute, 42 U.S.C. § 1983, to determine whether the Cable Communications Policy Act of 1984 preempts local obscenity prosecution of members of plaintiff PRTCA for cablecast of The Playboy Channel. Defendants have raised several jurisdictional and standing issues that must be resolved before proceeding to the merits of the case. Defendants argue first that as a result of a consent decree in this action, no case or controversy exists that would enable this Court to exercise its power under Article III of the United States Constitution. In the alternative, defendants argue that the Cable Communications Policy Act of 1984 provides no implied cause of action or substantial right that 42 U.S.C. § 1983 would protect. The Court finds both of these arguments unconvincing.

A. Mootness

The Court entered a consent decree in this case which was intended to be interim protection until the case was decided on its merits. Part of that consent decree was a permanent injunction that defendants were enjoined from

> a) Revoking or suspending, or threatening to revoke or suspend, the franchise licenses of cable operator members of coplaintiff Puerto Rico Cable Television Association, or imposing, or threatening to impose, any other administrative sanctions based upon any video programming carried on The Playboy Channel; provided, that nothing in this paragraph shall be construed to enjoin the Public Service Commission or the Public Service Commissioners from enacting, implementing, and enforcing regulations promulgated after the date of this Order concerning the trans-

mission on cable television systems of video programming, not excluding The Playboy Channel, that is obscene or otherwise unprotected by the Constitution, so long as those regulations and any action taken pursuant to those regulations are permitted by the Constitution of the United States and applicable law; and it is further provided that said regulations will not be enforced against members of coplaintiff Puerto Rico Cable Television Association or their agents, employees, or representatives, for a period of thirty (30) days following formal adoption and notification to all affected parties, and that plaintiffs may during that thirty (30) day period or thereafter seek declaratory or injunctive relief within the proceedings before this Court, or otherwise, respecting the validity and enforceability of said regulations;

b) Threatening to indict or otherwise threatening to initiate prosecutions against cable operator members of coplaintiff Puerto Rico Cable Television Association, or any of their agents, employees, and representatives, based upon any video programming carried on The Playboy Channel; or indicting or otherwise initiating prosecutions, or taking any administrative or civil actions against plaintiffs or any cable operator members of coplaintiff Puerto Rico Cable Television Association or their agents, representatives or employees, in whole or in part in reprisal or as a penalty for the exercise of First Amendment rights, including the right to file the instant lawsuit or to transmit constitutionally protected material; provided that the foregoing clause shall not be interpreted to prohibit the Secretary of Justice from instituting any criminal prosecution against plaintiff Playboy Programming Distribution Company, Inc., for programming distributed

on The Playboy Channel in Puerto Rico after the date of this Order that the Secretary of Justice believes in good faith is in fact obscene, so long as such prosecution is not brought in reprisal or as a penalty for the exercise of constitutionally protected rights;

c) Indicting or initiating any prosecution of or taking any administrative or civil action against cable operator members of coplaintiff Puerto Rico Cable Television Association or any other person or entity for any video programming on The Playboy Channel carried prior to the date of this Order; and

d) Otherwise intentionally interfering with any video programming carried on The Playboy Channel by cable operator member of coplaintiff Puerto Rico Television Association by intimidation of or putting coercive pressure upon said operators.

Defendants now argue that, as a result of the permanent injunction portion of the consent decree, the controversy is moot. There is no real and immediate injury to be enjoined because, defendants contend, the only possible injury, threatened persecution, has already been permanently enjoined.

Defendants rely primarily on *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983). Respondent in that case sought to enjoin the future use by the Los Angeles Police Department (LAPD) of a "chokehold" during arrests. The respondent charged that the chokehold had resulted in injury to himself and death to some. Lyons, as part of the complaint, sought injunctive relief. The United States Supreme Court held that "Lyons had failed to demonstrate a case or controversy . . . that would justify the equitable relief sought." 461 U.S. at 105 (footnote omitted). The Court continued:

> In order to establish an actual controversy in this case, Lyons would have had not only to allege that he would have another encounter with the police but also to make the incredible assertion either, (1) that *all* police officers in Los Angeles *always* choke any citizen with whom they happen to have an encounter, whether for the purpose of arrest, issuing a citation, or for questioning, or (2) that the City ordered or authorized police officers to act in such manner.

Id. at 105-106. The Supreme Court thereby emphasized the difficulty of regulating future conduct that may not come to pass.

Defendants in this case misread the consent decree. Although it permanently enjoins defendants from threatening prosecution and from prosecuting for any programming shown by plaintiffs *prior* to the entry of the consent decree, the injunction specifically states that nothing prohibits

> the Secretary of Justice from instituting any criminal proceeding against plaintiff Playboy Programming Distribution Company, Inc., for programming distributed on The Playboy Channel in Puerto Rico *after the date of this Order*. (emphasis supplied)

The permanent portion of this injunction is silent as to enjoining all prosecution of individual members of the PRTCA. Rather, the injunction against prosecution of individual members of the PRTCA is explicitly preliminary in nature. Defendants are permanently enjoined only from "threatening" prosecution, not from actually carrying it out. Defendant is attempting to bootstrap the permanency of the injunction against threats of prosecution into an apparent bar on prosecution. An absolute bar would moot this case but that bar is not yet in place. Defendants are

attempting to evade review of their prosecution under Law 3 by acquiesing to an injunction against certain verbal acts that may accompany prosecution. The United States Supreme Court has recently noted that, in cases where defendant attempts to avoid appellate review by voluntarily ceasing the challenged conduct without losing the ability to reinitiate the conduct once the mooted case is dismissed-+-

> [t]his Court has ruled that "[m]ere cessation of allegedly illegal conduct does not moot a case; if it did, the courts would be compelled to leave '[T]he defendant . . . free to return to his own ways.'"

Deakins v. Monaghan, 108 S. Ct. 523, 529, 98 L. Ed. 2d 529, 539 n.4 (1988), *quoting United States v. Phosphate Export Association*, 393 U.S. 199, 203 (1968), *in turn quoting United States v. W.T. Grant Co.*, 345 U.S. 629, 632 (1953). The case at bar is analogous. Although defendants may forever be prohibited from murmuring darkly to plaintiffs about the strains that an incipient prosecution may cause, should the Court dismiss the declaratory and injunctive claim as moot on account of defendants' silence, nothing would prevent defendants from tacitly engaging in the allegedly illegal conduct of swearing out a criminal complaint. Defendants have in fact ceased only part of the challenged conduct.

This analysis assumes, of course, that there is a real and immediate fear of prosecution against plaintiffs. In this regard *Lyons is* not the applicable standard. Mr. Justice White's conjectures about future meetings between Lyons and members of the Los Angeles Police Department as well as the actions that officers would take upon such a meeting differ graphically from the stipulated facts of this case.

The parties stipulated that in late March, 1987, defendant Rosa contacted individual members of defendant

PRTCA. The gist of defendant Rosa's communication was that he was about to initiate prosecution under the newly adopted extensions to the Puerto Rico anti-obscenity statute. The object of defendant Rosa's prosecution was carriage of The Playboy Channel. To that end, defendant Rosa subpoenaed Hector R. González, president of Teleponce Corporation, to appear before defendant Rosa at the Criminal Division of the Commonwealth Department of Justice. Two other members of PRCTA sent letters to the chairman of the Public Service Commission, defendant Almodóvar Correa. These letters indicated the cable operators' intent to discontinue cablecast of The Playboy Channel. Although the chairman never responded to these letters, defendant Rosa shortly thereafter informed officers of these cable operators that Rosa knew of their intent to drop The Playboy Channel and that the contemplated prosecution against them was likewise being dropped. The parties have stipulated that Teleponce, the sole surviving cablecaster of The Playboy Channel, had a reasonable fear of prosecution under Law No. 3 when this case was filed and the temporary restraining order issued.

In examining the immediacy and reality of this controversy, the Court is guided not by *Lyons*, but by *Steffel v. Thompson*, 415 U.S. 452 (1974). Petitioner Steffel sought in the United states District Court for the Northern District of Georgia a declaratory judgment that a Georgia trespassing statute was being applied against him in violation of the first and fourteenth amendments to the United States Constitution. Steffel had been distributing at a shopping center handbills critical of American involvement in the Vietnam War. After Steffel declined to cease pamphleteering when asked by shopping center employees, police were summoned. In the face of the threat of arrest, Steffel left. On a subsequent occasion, Steffel returned with a companion. Steffel and his companion were again warned by the police. Steffel left; his companion did not and was arrested for criminal trespass. *Id.* at 458-460.

The High Court first addressed the question of whether an actual case or controversy existed that was amenable to review. The Supreme Court held that even absent a pending criminal proceeding, a federal plaintiff demonstrating a genuine threat of enforcement of a disputed state criminal statute may seek declaratory relief. *Id.* at 461-462, 475.

In *Steffel*, the Supreme Court was examining whether such declaratory relief would be proper for a constitutional challenge to a state criminal statute. In the case at bar, plaintiffs have facially attacked the constitutionality of Law No. 3 as violative of the first amendment. For this alleged violation plaintiffs seek injunctive relief. Plaintiffs further seek declaratory relief that the Cable Communications Policy Act of 1984 preempts Law No. 3. This is also a constitutional claim.

Article VI of the United States Constitution provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Where Congress properly exercises its constitutional power, any contrary state law must yield: it is preempted. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824) (New York state law awarding exclusive franchise for ferry traffic between New York City and Elizabethtown, New Jersey, preempted by congressional power to regulate interstate commerce).[1]

Section 638 of the Cable Communications Policy Act of 1984 provides:

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[1] The term "preemption" was not used by the Court in *Gibbons v. Ogden*.

Criminal and civil liability

Nothing in this subchapter shall be deemed to affect the criminal or civil liability of cable programmers or cable operators pursuant to the Federal, State, or local law of libel, slander, obscenity, incitement, invasions of privacy, false or misleading advertising, or other similar laws, except that cable operators shall not incur any such liability for any program carried on any channel designated for public, educational, governmental use or on any other channel obtained under section 532 of this title [§ 612 of the Act] or under similar arrangements.

§ 558.

Section 612 of the Cable Communications Policy Act, 47 U.S.C. § 532, in turn provides for commercial use of cable channels by persons unaffiliated with the cable operator. The section sets forth detailed policies and procedures whereby commercial entities unaffiliated with the cable operator may gain access to cable systems. Section 612 (b)(1), 47 U.S.C. § 532 (b)(1), sets the amount of cable channel capacity that must be set aside for persons unaffiliated with the cable operator.[2] Section 612(c), 47 U.S.C.

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[2] Designation of channel capacity for commercial use:

(1) A cable operator shall designate channel capacity for commercial use by persons unaffiliated with the operator in accordance with the following requirements:

(A) An operator of any cable system with 36 or more (but not more than 54) activated channels shall designate 10 percent of such channels which are not otherwise required for use (or the use of which is not prohibited) by Federal law or regulation.

(B) An operator of any cable system with 55 or more (but not more than 100) activated channels shall designate 15 percent of such channels which are not otherwise required for use (or the use of

§ 532(c), ordains the commercial relationship between the cable operator and the unaffiliated cable programming provider.[3] It is undisputed that at least one member of the PRCTA, Teleponce, has a sufficient cable channel capacity, 36 channels, to make it fall under section 612(b)(1)(A), 47 U.S.C. § 532(b)(1)(A). Teleponce is the last cable system in Puerto Rico to continue broadcasting The

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which is not prohibited) by Federal law or regulation.

(C) An operator of any cable system with more than 100 activated channels shall designate 15 percent of all such channels.

(D) An operator of any cable system with fewer than 36 activated channels shall not be required to designate channel capacity for commercial use by persons unaffiliated with the operator, unless the cable system is required to provide such channel capacity under the terms of a franchise in effect on October 30, 1984.

(E) An operator of any cable system in operation on October 30, 1984, shall not be required to remove any service actually being provided on July 1, 1984, in order to comply with this section, but shall make channel capacity available for commercial use as such capacity becomes available until such time as the cable operator is in full compliance with this section.

47 U.S.C. § 532(b)(1).

[3] (c) Use of channel capacity by unaffiliated persons; editorial control; restriction on service:

(1) If a person unaffiliated with the cable operator seeks to use channel capacity designated pursuant to subsection (b) of this section for commercial use, the cable operator shall establish, consistent with the purpose of this section, the price, terms and conditions of such use which are at least sufficient to assure that such use will not adversely affect the operation, financial condition, or market development of the cable system.

(2) A cable operator shall not exercise any editorial control over any video programming provided pursuant to this section, or in any other way consider the content of such programming, except that an operator may consider such content to the minimum extent necessary to establish a reasonable price for the commercial use of designated channel capacity by an unaffiliated person.

47 U.S.C. § 532(c).

Playboy Channel. The effect of coming under section 612(b), 47 U.S.C. § 532(b), is that any unaffiliated commercial cable programmer may demand access to any qualifying cable system. That access must then be provided by the cable operator under reasonable terms and conditions. This required access is available to any unaffiliated commercial cable programmer up to the point where the mandated access percentage of the cable system's capacity if filled.

Once such statutorily mandated access is obtained, the cable operator loses editorial control over the video programming provided by the unaffiliated commercial cable programmer. CCPA § 612(c)(2), 47 U.S.C. § 532(c)(2). Another consequence for the statutorily mandated access is—

> that cable operators shall not incur any such liability for any program carried on any channel designated for public, educational, governmental use or on any other channel obtained under section 532 of this title or under similar arrangements.

Cable Communications Policy Act § 638, 47 U.S.C. § 558.

Plaintiffs contend that they are entitled to a declaratory judgment that section 638 preempts local prosecution of cable operators for programming carried on a section 612 channel. Again, this is a constitutional attack.

The Court does not yet reach this question at this stage of this Opinion and Order, for there are still jurisdictional and standing questions to be resolved. The Court only holds at this juncture that plaintiffs' claims of fear of prosecution are more *Steffel*-like than *Lyons*-like. It is beyond cavil that communications by a Puerto Rico prosecutor, both in threatening prosecution and in dropping prosecution after somehow becoming cognizant that certain individual members of the PRCTA would discontinue ca-

blecast of The Playboy Channel, represent a very real, and very fearsome, possibility of prosecution. These are not the "incredible assertions" of *Lyons*, 461 U.S. at 105-106. Rather, the actions of the Puerto Rico prosecutor are "ample demonstration that [plaintiffs'] concern with [prosecution] has not been 'chimerical.' " *Steffel*, 415 U.S. at 459, *citing Poe v. Ullman*, 367 U.S. 497, 508 (1961). This controversy is not moot.

B. Right of Action Under Section 1983

Defendants also contend that The Cable Communications Policy Act of 1984 provides no implied cause of action or substantial right that the civil rights statute, 42 U.S.C. § 1983, would protect. The availability of section 1983 to enjoin violations of federal statutes by state agents is generally recognized. *Maine v. Thiboutot*, 448 U.S. 1 (1980). In *Thiboutot*, the State of Maine and the Maine Commissioner of Human Services recomputed Thiboutot's benefits under the Aid to Families with Dependant Children (AFDC) program. The recomputation was not in Thiboutot's favor. After exhausting his administrative remedies, Thiboutot sought judicial review of the benefits denial under 42 U.S.C. § 1983. Upon eventual review, the United States Supreme Court held:

> Even where the language is ambiguous, however, any doubt as to its [§ 1983's] meaning has been resolved by our several cases suggesting, explicitly or implicitly, that the § 1983 remedy broadly encompasses violations of federal statutory as well as constitutional law.

448 U.S. at 4 (citations omitted).

This broad language has been refined in subsequent decisions. In *Middlesex County Sewerage Authority v. National Sea Clammers Association*, 453 U.S. 1 (1981), the Supreme Court narrowed the application of § 1983 to statutory claims by excluding those cases in which (i) Congress

had, in the statute at issue, foreclosed private enforcement of the statute in the enactment itself, and (ii) it was clear that the statute at issue was not the kind that created enforceable "rights." *Sea Clammers*, 453 U.S. at 19 (1981), *citing Pennhurst State School and Hospital v. Haldeman*, 451 U.S. 1, 28 (1981).

> The key inquiry is the intent of the Legislature (citations omitted). We look first, of course, to the statutory language, particularly the provisions made therein for enforcement and relief. Then we review the legislative history and other traditional aids of statutory interpretation to determine congressional intent.

Sea Clammers, 453 U.S. at 13. "Under these cases [*Thiboutot*, *Pennhurst*, and *Sea Clammers*], if there is a state deprivation of a 'right' secured by a federal statute, § 1983 provides a remedial cause of action *unless* the state actor *demonstrates by express provision* or other specific evidence from the statute itself that Congress intended to foreclose such private enforcement. 'We do not lightly conclude that Congress intended to preclude reliance on § 1983 as a remedy' for the deprivation of a federally secured right." *Wright v. Roanoke Redevelopment & Housing Authority*, 479 U.S. 418, 423-24 (1987), *quoting Smith v. Robinson*, 468 U.S. 992, 1012 (1984).

The Court, then, looks first to the plain language of the statute to see if Congress intended to supplant a § 1983 remedy with a comprehensive regulatory scheme for cable television. In favor of defendants' position is the fact that, at several points in the Cable Communications Policy Act of 1984, Congress specifically ordained exclusively federal, or concurrent federal-state, judicial review of state actions in regulating cable television. Section 652 of the Act provides the following:

> Judicial proceedings

> (a) Any cable operator adversely affected by any final determination made by a franchising authority under section 545 or 546 of this title [§ 625 or § 626 of the Act] may commence an action within 120 days after receiving notice of such determination, which may be brought in—
>
> (1) the district court of the United States for any judicial district in which the cable system is located; or
>
> (2) in any State court of general jurisdiction having jurisdiction over the parties.
>
> (b) The court may award any appropriate relief consistent with the provisions of the relevant section described in subsection (a) of this section.

47 U.S.C. § 555.

Section 625 of the Act, 47 U.S.C. § 545, governs a local franchising authority's power to modify, or to refrain from modifying, a franchisee's obligations during the course of a franchise agreement. Section 626 of the Act, 47 U.S.C. § 546, governs franchise renewal procedures.[4] Section 612

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[4] Both §§ 625 and 626 of the Act designate the grounds for judicial review:

> (b) Judicial proceedings; grounds for modification by court
>
> (1) Any cable operator whose request for modification under subsection (a) of this section has been denied by a final decision of a franchising authority may obtain modification of such franchise requirements pursuant to the provisions of section 555 of this title.
>
> (2) In the case of any proposed modification of a requirement for facilities or equipment, the court shall grant such modification only if the cable operator demonstrates to the court that—
>
> (A) it is commercially impracticable for the operator

of the Act, a section directly involved in this litigation,[5] grants exclusive federal judicial review of actions by cable operators in dealings with cable programmers:

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to comply with such requirement; and

(B) the terms of the modification requested are appropriate because of commercial impracticability.

(3) In the case of any proposed modification of a requirement for services, the court shall grant such modification only if the cable operator demonstrates to the court that the mix, quality, and level of services required by the franchise at the time it was granted will be maintained after such modification.

47 U.S.C. § 545(b).

(e) Judicial review; grounds for relief

(1) Any cable operator whose proposal for renewal has been denied by a final decision of a franchising authority made pursuant to this section, or has been adversely affected by a failure of the franchising authority to act in accordance with the procedural requirements of this section, may appeal such final denial decision or failure pursuant to the provisions of section 555 of this title.

(2) The court shall grant appropriate relief if the court finds that—

(A) any action of the franchising authority is not in compliance with the procedural requirements of this section; or

(B) in the event of a final decision of the franchising authority denying the renewal proposal, the operator has demonstrated that the adverse finding of the franchising authority with respect to each of the factors described in subparagraphs (A) through (D) of subsection (c)(1) of this section on which the denial is based is not supported by a preponderance of the evidence, based on the record of the proceeding conducted under subsection (c) of this section.

(f) Finality of administrative decision

Any decision of a franchising authority on a proposal for renewal shall not be considered final unless all administra-

(d) Right of action in district court; relief; factors not to be considered by court

Any person aggrieved by the failure or refusal of a cable operator to make channel capacity available for use pursuant to this section may bring an action in the district court of the United States for the judicial district in which the cable system is located to compel that such capacity be made available. If the court finds that the channel capacity sought by such person has not been made available in accordance with this section, or finds that the price, terms, or conditions established by the cable operator are unreasonable, the court may order such system to make available to such person the channel capacity sought, and further determine the appropriate price, terms, or conditions for such use consistent with subsection (c) of this section and may award actual damages if it deems such relief appropriate. In any such action, the court shall not consider any price, term, or condition established between an operator and an affiliate for comparable services.

47 U.S.C. § 532(d).

Defendants' position is that because the Legislature gave express jurisdictional grants in some sections of the Cable Communications Policy Act of 1984, the absence of juris-

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tive review by the State has occurred or the opportunity therefor has lapsed.

47 U.S.C. § 546(e), (f).

Not only is jurisdiction allowed, then, but the factors to be weighed in the Court's decision and the standards of proof to be met are all statutorily mandated. This is a fairly comprehensive set of instructions to the court.

[5] See pp. 34-38, *infra*.

dictional grants elsewhere in the Act betrays the intent of Congress not to grant jurisdiction to the courts over any other matter governed by the Act. *Inclusio unius est exclusio alterius.*

The legislative history of the Cable Communications Policy Act of 1984 is set out in House Report No. 934, 98th Cong. 2d Sess. (1984), *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS 4655. Although, pursuant to the agreement of the Conference Committee, the Senate bill (S. 66) was passed, the House bill (H.R. 4103) contained significant portions that amended the approved Senate bill, and the House Report on the bill was adopted. The legislative history specifically analyzes each provision of the Act. In detailing what became—after amendment in the Conference Committee—sections 638 and 639 of Act, the House report reads:

> Section 639. [§ 638 of the Act as passed by Congress] Criminal and civil liability
>
> Section 639 [638] provides that nothing in the title shall be deemed to affect the criminal or civil liability of cable programmers or cable operators with respect to Federal (including FCC regulations), state and local laws not inconsistent with this title relating to libel, slander, obscenity, incitement, privacy, false or misleading advertising, or other similar areas of law. The section further provides that cable operators cannot be held criminally or civilly liable for material transmitted over public, educational, or governmental access channels, or leased access channels, since the bill otherwise prohibits the operator's editorial control over all such channels. Cable programmers shall include all parties that exercise control over the content of programs, and would not only include program producers to the extent

this would be consistent with applicable Federal, state and local law.

The Committee does not intend to affect liability which might result from other speech which may be held by the courts to be unentitled to constitutional protection (as discussed in relation to section 624(d)).

Section 640. [§ 639] Obscene programming

This section establishes the Federal standard and penalties to be applicable to cable television with respect to pornographic programming. The bill sets forth a criminal prohibition against the transmission of any cable service which is obscene or otherwise unprotected by the Constitution. Any violation is punishable by a fine of up to $10,000 or by imprisonment for up to two years, or both.

Existing severability provisions of the Communications Act of 1934 (47 U.S.C. 608) shall apply if this section, among other sections, of H.R. 4103 is held invalid.

H.R. Rep. No. 934 at 95, 1984 U.S. CODE CONG. & ADMIN. NEWS at 4732. These sections clearly delineate the difference between a cable programmer (one who produces video programming) and a cable operator. The section does not—in so many words—give an explicit jurisdictional grant to this court to entertain an action for declaratory judgment that cable operators may not be prosecuted under Federal, state, or local laws for any of the enumerated examples of constitutionally unprotected speech. This, however, is as far as defendants' argument can be stretched.

There is certainly no question that these sections do not explicitly *deny* this Court jurisdiction to entertain the declaratory judgment action. *Wright*, 479 U.S. at 423. Neither

can the Court read into section 638 of the Act an *implicit* denial of jurisdiction. The Court must examine, however, whether there is an implicit *grant* of jurisdiction, *i.e.*, an implicit cause of action.

Whether a cause of action may be so implied must be examined through the four-part analysis of *Cort v. Ash*, 422 U.S. 66 (1975). The Supreme Court in that case reviewed an injunction obtained against directors of a corporation who had expended corporate funds on the 1972 presidential elections, in apparent violation of 18 U.S.C. § 610. Although intervening 1974 amendments to the Federal Election Campaign Act relegated citizen complaints concerning election law violations to the expertise of the newly created Federal Elections Commission, prior to the 1974 amendments, when the lawsuit was instigated, no private cause of action could be implied under 18 U.S.C. § 610. *Cort*, 422 U.S. at 80-85.

> In determining whether a private right of action is implicit in a statute not expressly providing one, several factors are relevant. First, is the plaintiff 'one of the class for whose *especial* benefit the statute was enacted,' [citation omitted] —that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or deny one? [citation omitted]. Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? [citations omitted]. And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law. [citations omitted].

Cort, 422 U.S. at 78.

The Court examines these factors seriatim. First, the Court finds that cable operators are clearly a class or persons for whose especial benefit the Cable Communications Policy Act, and section 638 in particular, was enacted. The act as a whole sets forth a comprehensive regulatory scheme protecting cable operators, under various conditions, from unchecked power exercised by local franchise authorities and, here, in section 638, from civil and criminal liability, under certain circumstances. These are benefits, and the cable operator beneficiaries are clearly identified in the plain language of the statute.

Second, while there is no explicit or implicit indication of intent to deny a remedy, and although there is no explicit indication of intent to grant a remedy, the Court finds that there is implicit indication of intent to create a remedy in favor of cable operators for violation of § 638. Defendants' argument that a remedy is foreclosed is unavailing. This is not a case "[w]hen the remedial devices provided in a particular Act are sufficiently comprehensive, [that] they may suffice to demonstrate congressional intent to preclude the remedy of suits under § 1983." *Sea Clammers*, 453 U.S. at 20. It is true that Congress did give explicit remedies for many things in the Act. Nevertheless, there is no enforcement mechanism otherwise provided in the Cable Communications Policy Act of 1984 should local authorities seek to prosecute a cable operator, for exam ple, under an anti-obscenity statute. Furthermore, the language absolving cable operators is in mandatory, not precatory, terms: "[C]able operators *shall not incur any liability.*" 47 U.S.C. § 558 (emphasis supplied). Such a mandate is in contra-distinction to such cases as *Pennhurst*, where the federal statute at issue merely advised the states to pursue a particular course of conduct. *Pennhurst*, 451 U.S. at 27; *see also Samuels v. District of Columbia*, 770 F.2d 184, 195 (D.C. Cir. 1985). This Court concludes that section 638 of the Act, 47 U.S.C. § 558, means what it says, that cable operators shall not incur

any criminal or civil liability for programming cablecast under the provisions of section 612 of the Act, 47 U.S.C. § 532.

Third, an implied right of action to seek a declaratory judgment that a cable operator's cablecasting programming pursuant to section 612 of the Act are immune from state prosecution, is wholly consistent with the underlying purposes of the legislative scheme. The purposes underlying the Cable Communications Policy Act of 1984 are set forth in the statute.

> Purposes
>
> The purposes of this subchapter are to—
>
> (1) establish a national policy concerning cable communications;
>
> (2) establish franchise procedures and standards which encourage the growth and development of cable systems and which assure that cable systems are responsive to the needs and interests of the local community;
>
> (3) establish guidelines for the exercise of Federal, State, and local authority with respect to the regulation of cable systems;
>
> (4) assure that cable communications provide and are encouraged to provide the widest possible diversity of information sources and services to the public;
>
> (5) establish an orderly process for franchise renewal which protects cable operators against unfair denials of renewal where the operator's past performance and proposal for future performance meet the standards established by this subchapter; and
>
> (6) promote competition in cable communications and minimize unnecessary regulation that would

> impose an undue economic burden on cable systems.

47 U.S.C. § 521.

For purposes of this case, the Court focuses on the first three enumerated purposes of the Act. Puerto Rico undeniably has an interest in controlling the dissemination of obscene material. The Court need not, however, at this time make any determination concerning the type of programming carried on The Playboy Channel. The Court here examines the narrow question of what rights, if any, are enforceable, and by whom, under § 638 of the Cable Communications Policy Act of 1984. Congress established in that Act a national policy, one that coordinates federal, state, and local authority over cable franchising. In the legislative history, Congress stated—

> H.R. 4103 [the House of Representatives predecessor of the Act] establishes a national policy that clarifies the current system of local, state and Federal regulation of cable television. This policy continues reliance on the local franchising process as the primary means of cable television regulation, while defining and limiting the authority that a franchising authority may exercise through the franchise process.

H.R. Rep. No. 934 at 19, 1984 U.S. CODE CONG. & ADMIN. NEWS at 4656.

Congress, then, has taken control of cable television and ceded back to the local authorities certain limited powers. Congress' aim was to achieve a nationwide uniformity of regulation:

> [T]he Committee recognizes that the franchise process in every city has very significant national implications for the full development of cable telecommunications and for the delivery of the widest diversity of information sources. In view of

> this national impact, it is appropriate and necessary for Congress to adopt cable legislation.

Id. at 22, 1984 U.S. CODE CONG. & ADMIN. NEWS at 4659.

> The legislation also contains provisions to assure that cable systems provide the widest possible diversity of information services and sources to the public, consistent with the First Amendment's goal of a robust marketplace of ideas—an environment of "many tongues speaking with many voices."

Id. at 19, 1984 U.S. CODE CONG. & ADMIN. NEWS at 4656.

In keeping with this promotion of first amendment values, Congress established two kinds of access to cable systems by cable programmers. The first, detailed in section 611 of the Act, mandates an allotment of channel capacity to public, educational, and governmental (PEG) cable programmers. 47 U.S.C. § 531. These "PEG access channels" operate independently of editorial control by the cable operator. CCPA § 611(e), 47 U.S.C. § 531(e). The second access system, known as leased access, is contained in section 612 of the Act and

> is aimed at assuring that cable channels are available to enable program suppliers to furnish programming when the cable operator may elect not to provide that service as part of the program offerings he makes available to subscribers. Thus, section 612 establishes a scheme to assure access to cable systems by third parties unaffiliated with the cable operator, and thereby promotes and encourages an increase in the sources of programming available to the public.

Id. at 47, 1984 U.S. CODE CONG. & ADMIN. NEWS at 4684.

Like PEG access channels, section 612(c)(2) provides that commercial leased access channels are free from the editorial control of the cable operators supplying the access. 47 U.S.C. § 532(c)(2). In keeping with this deprivation of editorial control, the legislative history points out that:

> [Section 638 of the Act, 47 U.S.C. § 558] further provides that cable operators cannot be held criminally or civilly liable for material transmitted over public, educational, or governmental access channels, or leased access channels, since the bill otherwise prohibits the operator's editorial control over all such channels.

H.R. Rep. No. 934 at 95, 1984 U.S. CODE CONG. & ADMIN. NEWS at 4732. Cable operators cablecasting pursuant over PEG or leased access channels are not liable for material thereby broadcast. The statute says so, and the legislative history reiterates it. In the face of threatened local prosecution, a declaratory judgment preempting the prosecution is wholly consistent with purposes underlying the Act.

Fourth, the implied right of action sought by plaintiffs in this case is not one traditionally relegated to state law. Congress has raised regulation of cable television to the national level to ensure the national development of cable telecommunications. A ban on local prosecution for material cablecast on a federally established and protected channel is a matter for the federal courts. It is a question of preemption, and the federal courts are best equipped to enforce that constitutional doctrine. The Court therefore holds that there is jurisdiction to examine whether relief may be granted for alleged violations of the Cable Communications Policy Act of 1984 under 42 U.S.C. § 1983.

II. STANDING

Defendants have argued, for various reasons, that none of the plaintiffs has standing to bring this suit.

A. Plaintiff Puerto Rico Cable Television Association

Defendants have argued that the Puerto Rico Cable Television Association (PRCTA), being an unincorporated association, lacks capacity to sue. In support of that argument, defendants cite the Civil Code of Puerto Rico for the proposition that an artificial person, such as PRCTA, has capacity to sue and be sued only if recognized and organized by law. Defendant contends that insofar as PRTCA has never formally incorporated or organized under the laws of Puerto Rico, it is not a juridically cognizable person. This argument ignores the plain language of Fed. R. Civ. P. 17(b):

> Capacity to Sue or be Sued . . . In all other cases capacity to sue or be sued shall be determined by the law of the state in which the district court is held, *except* (1) that a partnership or other unincorporated association, which has no such capacity by the law of such state, may sue or be sued in its common name *for the purpose of enforcing for or against it a substantive right existing under the Constitution or laws of the United States.* (emphasis added).

Defendant next contends that plaintiff PRCTA has no standing to sue on its own behalf. Defendant argues that the allegations of the complaint—that PRCTA will suffer itself financial and non-financial injuries—are insufficient to warrant the granting of the declaratory and injunctive relief requested.

In *Camel Hair and Cashmere Institute v. Associated Dry Goods*, 799 F.2d 6 (1st Cir. 1986), the United States Court of Appeals for the First Circuit examined the sufficiency of pleadings in a case where a trade association brought suit on its own behalf as well as on behalf of its members. The Institute claimed damages from the defendant's actions in two ways: first, that defendant's action would injure the Institute's reputation and credibility as a public-

interest organization; and second "by causing such severe harm to its members as to impair the members' ability to pay their dues to the plaintiff [Institute]." *Id.* at 10. The First Circuit held these allegations insufficient to warrant preliminary injunctive relief under the Lanham Act. *Id.*

In this case, plaintiff PRCTA has not made allegations that rise even to the level of specificity that the First Circuit found insufficient in *Camel Hair*. The Court is therefore constrained to find that PRCTA has no standing to sue on its own behalf.

Nevertheless, PRCTA does have standing to sue on behalf of its members. An association may have standing to sue on behalf of its members even absent injury to the association itself, under certain circumstances. *Warth v. Seldin*, 422 U.S. 490, 511 (1975); *Camel Hair*, 799 at 10.

> [A]n association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.

Hunt v. Washington Apple Advertising Commission, 432 U.S. 333, 343 (1977); *see also New York State Club Association v. City of New York*, 108 S. Ct. 2225, 2231-32 (1988).

The Court finds that each of the individual members of PRCTA could have sufficiently alleged a real and immediate claim under 42 U.S.C. § 1983 for enforcement of the preemption provisions of the Cable Communications Policy Act of 1984. The Court has made a detailed analysis that such a case or controversy exists. The record before the Court, including the stipulations of the parties, reveals that any member of PRCTA could have brought this action and

would have alleged a particularized harm sufficient to give that member standing.

As to the second factor enunciated by the *Washington Apple* Court, this Court finds that plaintiffs have sufficiently pled the organizational purposes of the PRCTA, and that these avowed purposes are consonant with the relief requested and the interest sought to be protected in this suit. This Court further finds that suit by the PRCTA on behalf of its members satisfies the third *Washington Apple* requirement. The claim asserted and the relief requested, at this stage of the litigation, do not require the participation of the individual PRCTA members. "Actions for declaratory, injunctive and other forms of prospective relief have generally been held particularly suited to group representation." *Camel Hair*, 799 F.2d at 12 (citations omitted). The relief requested here runs to all PRCTA members equally: protection from local prosecution. No individualized evidence is required.

B. The Playboy Plaintiffs

The defendants have challenged the standing of plaintiffs Playboy Enterprises, Inc., (PEI) and the Playboy Programming Distribution Corp. (PPDC) (collectively the Playboy plaintiffs) to bring suit seeking a declaratory judgment and injunction against defendants for prosecution. Defendants argue that the Playboy plaintiffs have no standing to enforce the statutory or constitutional rights of a third party in this case, the individual members of the PRCTA. The Court holds otherwise. "When a governmental prohibition or restriction imposed on one party causes specific harm to a third party, harm that a constitutional provision or statute was intended to prevent, the indirectness of the injury does not necessarily deprive the person harmed of standing to vindicate his rights." *Warth v. Seldin*, 422 U.S. at 505 (citation omitted). To pass the standing threshold, the Playboy plaintiffs here must demonstrate three facets of their claim. First, the

Playboy plaintiffs must show " 'actual or threatened injury as a result of the putatively illegal conduct of the defendant,' " *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 472 (1982), *quoting Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 99 (1979). Second, the injury must be such that it " 'fairly can be traced to the challenged action.' " *Valley Forge*, 454 U.S. at 472, *quoting Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 38 (1976). Finally, the challenged action must be of the kind " 'likely to be addressed by a favorable decision.' " *Valley Forge*, 454 U.S. at 472, *quoting Simon*, 426 U.S. at 41.

The injury alleged by the Playboy plaintiffs is the deprivation of their ability to disseminate The Playboy Channel on cable systems composing the membership of the PRCTA and the threat of deprivation of this dissemination ability with regards to PRCTA member Teleponce, Inc. It is alleged that this deprivation would come about via local anti-obscenity prosecution of PRCTA members in violation of rights guaranteed by § 638 of the Act, 47 U.S.C. § 558. The first question posed by this assertion is whether a lack of cablecast of The Playboy Channel is an injury at all.

In *Bantam Books v. Sullivan*, 372 U.S. 58 (1963), the United States Supreme Court declared unconstitutional the informal administrative actions of the Rhode Island Commission To Encourage Morality in Youth. The Commission sent notices to book distributors detailing that a majority of the Commission members had found certain listed books distributed by the bookseller to be "objectionable." 372 U.S. at 62. The notices usually went on to describe the Commission's duty to refer cases it considered to be purveyance of obscenity to the Rhode Island Attorney General for prosecution. The Supreme Court considered these "prior administrative restraints," operating without the benefit of the protections afforded by judicial proceedings,

to be censorship. 372 U.S. at 71-72. In reaching this result, the Court examined the standing of the appellant publishers to seek relief from the notices sent to the distributors. The Supreme Court noted:

> The constitutional guarantee of freedom of the press embraces the circulation of books as well as their publication, *Lovell v. Griffin*, 303 U.S. 444, 452 (1938), and the direct and obviously intended result of the Commission's activities was to curtail the circulation in Rhode Island of books published by appellants... Unless he [the publisher] is permitted to sue, infringements of freedom of the press may too often go unremedied. (citation omitted).

Bantam Books, 372 U.S. at 62 n.4.

This Court views the relationship between the Playboy plaintiffs and the PRCTA to be the cable television equivalent of the publisher and bookseller. When the cable operator is prohibited from cablecasting, so too is the cable programmer prohibited from disseminating programming. This analysis certainly allows the Playboy plaintiffs standing to sue for declaratory and injunctive relief for alleged violations of the first amendment. Whether the Playboy plaintiffs have standing to sue for enforcement of the PRCTA's preemptive rights under section 638 of the Act, 47 U.S.C. § 558, is another question.

Ultimately, that separate question is so intimately entwined with the first amendment question as to give the Playboy plaintiffs standing. We return to House Report 934:

> The legislation also contains provisions to assure that cable systems provide the widest possible diversity of information services and sources to the public, consistent with the First Amendments goal of a robust marketplace of ideas—an envi-

ronment of "many tongues speaking with many voices."

H.R. Rep. No. 934, 98th Cong. 2d Sess. (1984) at 19, *reprinted in* 1984 U.S. CODE, CONG. & ADMIN. NEWS at 4656. *See also* § 601, Cable Communications Policy Act of 1984, 47 U.S.C. § 521 (Purposes). In addressing standing questions, the Supreme Court "has required that the plaintiff's complaint fall within 'the zone of interests to be protected or regulated by the statute or constitutional guarantee in question.' " *Valley Forge*, 454 U.S. at 475, *quoting Association of Data Processing Service Organizations v. Camp*, 397 U.S. 150, 153 (1970) (footnote omitted). The Playboy plaintiffs' complaint fully meets this requirement. The Cable Communications Policy Act of 1984 provides a statutory mechanism for vindication of first amendment interests for cable operators, cable programmers, and the public by forcing the operators and programmers to work together for the benefit of the public. *Cf. Red Lion Broadcasting v. Federal Communications Commission*, 395 U.S. 367, 392 (1969) (fairness doctrine upheld despite limited infringement of free speech rights of broadcasters caused by requiring them to broadcast opposing viewpoints). The rights and responsibilities of the cable operators and cable programmers in meeting the first amendment interests of the public are mutually reinforcing. Cable operators, the PRCTA here, plainly have standing to seek a declaration of protection under § 638 of the Act, 47 U.S.C. § 558. Cable programmers, the Playboy plaintiffs here, have standing to seek a declaration of protection under that same provision because of the personal injury that would necessarily befall them absent their ability to bring suit. *Bantam Books*, 372 U.S. at 64 n.6.

The second factor of the *Valley Forge* analysis requires this Court to examine whether the alleged injury " 'fairly can be traced to the challenged action.' " 454 U.S. at 472 (citation omitted). The Court's analysis of whether a "case or controversy" exists here, *supra* pp. 4-14, answers this

question. It is precisely the threats of prosecution, the challenged action, that pose the injury alleged by plaintiffs. As to the third *Valley Forge* factor, whether the injury " 'is likely to be redressed by a favorable decision' ", *id.*, this question is likewise affirmatively answered. The Playboy plaintiffs therefore have standing to seek declaratory and injunctive relief under 42 U.S.C. § 1983 for violation of rights guaranteed under the Cable Communications Policy Act of 1984.

The Court has therefore reached the jurisdictional and standing issues as to all plaintiffs' claims for declaratory and injunctive relief under 42 U.S.C. § 1983 for alleged violations of the Cable Communications Policy Act of 1984. A justiciable case or controversy exists, which may be brought before the Court under the civil rights statute, and, with the exception of PRCTA suing on its own behalf, all plaintiffs here have standing to bring the suit.

III. PREEMPTION OF LOCAL PROSECUTION OF CABLE OPERATORS

The statutory framework whereby unaffiliated cable programmers may seek mandatory leased access is already set forth in this Opinion and Order. *See supra*, pp. 10-13. Plaintiffs aver that The Playboy Channel is being shown on the cable system of a PRCTA member pursuant to 612 of the Act, 47 U.S.C. § 532. It is undisputed that the PRCTA member at issue, Teleponce, is a cable system with a 36-channel capacity and all 36 channels are activated.[6] Under § 612(b)(1)(A), a cable operator with a chan-

[6] The term "activated channels"—

> means only the number of channels that subscribers actually are receiving. Although this would include any so-called dark channels which subscribers receive but which currently carry no programming, it would not equate to the total channel

nel capacity of at least 36 but not more than 54 activated channels must devote ten percent of that capacity to leased access. For Teleponce, then, at least three channels must be made available for leased access.

Plaintiffs have submitted affidavits that in April 1987, shortly before this lawsuit was filed, a verbal request was made by the Playboy plaintiffs to Teleponce. The request was for a designation of The Playboy Channel as a § 612 leased access channel. That request was not confirmed in writing until July 22, 1987, by letter from plaintiff PPDC to the president of Teleponce.

Defendants have characterized the § 612 designation of The Playboy Channel as a "post hoc attempt by PRCTA and PPDC to fashion the facts." The Court considers this line of argumentation unnecessary. Plaintiffs have shown that by at least July 22, 1987: (1) Teleponce was a cable system with 36 activated channels, making it fall under § 612(b)(1)(A) of the Act, 47 U.S.C. § 532(b)(1)(A); (2) The Playboy plaintiffs are "unaffiliated" with the cable operator Teleponce within the meaning of § 612(e)(1), 47 U.S.C. § 532(c)(1). Section 602(1) of the Act, 47 U.S.C. § 522(1); (3) The Playboy plaintiffs were seeking access for "commercial use" within the meaning of § 612(b)(5)(B) of the Act, 47 U.S.C. § 532(b)(5)(B); and (4) it may be fairly said without contradiction that Teleponce did in fact provide access for The Playboy Channel. § 612(c)(1) of the Act, 47 U.S.C. § 532(c)(1). The letter of July 22, 1987, makes clear that Teleponce lost editorial control over The Playboy Channel, as provided by § 612(c)(2) of the Act, 47 U.S.C. § 532(c)(2).

Section 638 of the Cable Communications Policy Act of 1984 then provides that

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capacity of the system.

130 CONG. REC. H 10441 (daily ed. Oct. 1, 1984) (statement of Rep. Wirth, floor manager of H.R. 4103), *reprinted in* 1984 U.S. CODE, CONG. & ADMIN. NEWS 4751.

> cable operators shall not incur any [civil or criminal] liability for any program carried on any . . . channel obtained under section 532 of this title [§ 612 of the Act] or under similar arrangements.

The Court must conclude that this plain language means what it says: the Common wealth of Puerto Rico's authority to bring criminal obscenity prosecutions against Teleponce or other similarly situated PRCTA members is preempted.

Defendants have attempted to shift the Court's attention to minor matters which the Court here disposes of. First, defendants claim that the designation of The Playboy Channel after the onset of this litigation reveals that previous transmission of The Playboy Channel was voluntary. Defendants argue, then, that such voluntary transmission is contrary to the spirit of diversity that the Act was designed to instill. A colloquy between Representative Timothy E. Wirth, Chairman of the Subcommittee on Telecommunications, Consumer Protection, and Finance of The House Committee on Energy and Commerce, and Representative Thomas J. Bliley, Jr., reveals otherwise

> Mr. Bliley. I understand that cable operators have an obligation not to fill their commercial access channels in order to avoid bona fide access use. Would it be accruate to say, however, that cable operators may only enter into leased access arrangements where the operator is opposed to granting the programmer access to the cable system?
>
> Mr. Wirth. No. There does not need to be a "hostile" or "adversarial" relationship between the operator and the programmer for a grant of access to an unaffiliated programmer to be a legitimate use of channel capacity designated pursuant to this section.

130 CONG. REC. H 10441 (Oct. 1, 1984), *reprinted in* U.S. CODE, CONG. & ADMIN. NEWS 4752.

Defendant Rosa has argued that the contracts between PRCTA members and the Playboy plaintiffs' predecessors are not of a kind contemplated in § 612 of the Act and that therefore the Playboy plaintiffs cannot seek designation as a § 612 channel. The Court finds this argument without merit. The legislative history reveals that many sorts of commercial arrangements, including profit sharing, were deemed permissible under § 612. *See* 130 CONG. REC. H 10441 (Oct. 1, 1984) (Colloquy between Rep. Wirth and Rep. Bliley), *reprinted in* 1984 U.S. CODE, CONG. & ADMIN. NEWS 4751-53; *see also* H.R. Rep. 934, 98th Cong. 2d Sess. at 50-52, *reprinted in* 1984 U.S. CODE, CONG. & ADMIN. NEWS at 4687-89.

Defendants finally argue that, in any event, The Playboy Channel on Teleponce was not designated as a § 612 channel until July 22, 1987, and that therefore local obscenity prosecution is not preempted for allegedly obscene transmissions prior to that date. The consent decree in this case already enjoins local obscenity prosecution of plaintiffs for any cable transmission prior to the date of the consent decree, June 4, 1987. The Court therefore need only examine the period between June 4 and July 22, a period of approximately six weeks.

All parties admit that the Cable Communications Policy Act of 1984 utterly changed cable television. The parties agree that contracts between the cable operators in this case, members of the PRCTA, and cable programmers, do not necessarily conform to the provisions of the Act. In viewing the purposes underlining the Cable Communications Policy Act of 1984 and the course of this litigation, the Court is not persuaded that the local prosecutors should consent to be permanently enjoined from prosecuting for pre-June 4 cable transmissions, be barred by Order of the Court from prosecuting post-July 22 cable transmissions,

and be allowed, nevertheless, to go back to examine the period between June 4 and July 22. The Court also considers plaintiffs' affirmations that § 612 designation was requested of Teleponce by the Playboy plaintiffs in April, before the complaint was filed. Finally, the Court is convinced by the words of the statute:

> [C]able operators shall not incur any [criminal or civil] liability for any program carried on any . . . channel obtained under section 532 of this title [§ 612 of the Act] *or under similar arrangements.*

47 U.S.C. § 558 (emphasis supplied.

Given the massive impact of this relatively newly minted legislation, the Court finds that the commercial arrangement between Teleponce and The Playboy Channel between June 4, 1987, and July 27, 1987, was of a sufficient tenor to acquire the preemptive protection of § 638 of the Act. 47 U.S.C. § 558.

The Court shall enter declaratory judgment in favor of the plaintiffs.

IV. FACIAL CONSTITUTIONALITY OF LAW NO. 3 AND AGREEMENT NO. 2

Plaintiffs have further challenged the facial constitutionality of Law No. 3 and the Public Service Commision's administrative adoption of Law No. 3 as Agreement No. 2.

The Court is hard pressed to find Law No. 3 facially unconstitutional. The statute, extending the provisions of the extant Puerto Rico anti-obscenity statute, explicitly adopts the standards enunciated in *Miller v. California*, 413 U.S. 15 (1973):

> [6-8] The basic guidelines for the trier of fact must be: (a) whether "the average person, applying contemporary community standards"

> would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

Id. at 24 (citations omitted).

The *Miller* test, slightly refined, was reaffirmed as recently as last term. *Pope v. Illinois*, 107 S. Ct. 1918 (1987). Law No. 3 does not present a prior restraint constituing censorship.

By the same token, Agreement No. 2 adopts the *Miller* test. Further, in contradistinction to *Bantam Books*, the Cable Communications Policy Act of 1984 is replete with judicial safeguards to prevent unbridled discretion on the part of the Public Service Commission resulting in impermissible censorship. Sections 625 and 626 of the Act, quoted *supra* note 5, permit judicial review of modifications and nonrenewals of franchises. 47 U.S.C. §§ 545, 546. Whether or not The Playboy Channel is obscene, and whether the PSC can force PRCTA members to adopt certain conditions before The Playboy Channel can be shown, or whether the PSC can deny or modify a franchise based upon that franchise's carriage of allegedly obscene programming, are all questions not before this Court. These must wait. The Court cannot find Law No. 3 and Agreement No. 2 facially unconstitutional.

V. SUMMARY

Pursuant to 28 U.S.C. § 2201, the Court ADJUDGES AND DECREES the following:

1. Teleponce, Inc., carries The Playboy Channel, a program developed and distributed by plaintiffs Playboy Enterprises, Inc., and the Playboy Programming Distribution

Corp., pursuant to § 612 of the Cable Communications Policy Act of 1984, 47 U.S.C. § 532.

2. Local prosecution of Teleponce, Inc., for violation of Law No. 3 of the Seventh Special Session of the Tenth Legislature of the Commonwealth of Puerto Rico is preempted by operation of § 638 of the Cable Communications Policy Act of 1984, 47 U.S.C. § 558.

3. Individual members of plaintiff Puerto Rico Cable Television Association, should they likewise designate channel capacity pursuant to § 612 of the Cable Communications Policy Act of 1984, 47 U.S.C. § 532, shall be free from criminal and civil liability under the laws of Puerto Rico for libel, slander, obscenity, incitement, invasions of privacy, or false or misleading advertising, pursuant to the preemptive provision of § 638 of the Cable Communications Policy Act of 1984, 47 U.S.C. § 558.

IT IS FURTHER ORDERED AND ADJUDGED that defendants, their agents and employees, their successors in office, and all persons in active concert with them, be and hereby are permanently enjoined, from in any manner, either directly or indirectly initiating prosecutions against cable operator members of coplaintiff Puerto Rico Cable Television Association, or any of their agents, employees and representatives, based upon any video programming carried on The Playboy Channel.

SO ORDERED, DECREED, AND ADJUDGED.

In San Juan, Puerto Rico, this 31 day of October, 1988.

/s/ Jaime Pieras, Jr.
JAIME PIERAS, JR.
U.S. DISTRICT JUDGE